

## Public Comments on Draft EA on Issuing Subsistence Quota to Makah 2001/2002

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## Section A - IWC

1. The Background section of the Draft EA is incomplete and includes incorrect information regarding the events that occurred at the 1996 and 1997 IWC annual meetings and the U.S. Government's conclusions regarding the IWC's adoption of a gray whale quota in 1997.

*The Background section was included in the EA to provide historical and legal context for the analysis of environmental effects of the four alternatives. It is true, as some commenters noted, that the EA is predicated on our IWC quota being available to the Makah Tribe. The United States allocated a quota of five gray whales to the Makah Tribe in 1998, 1999, and 2000 (but later set the quotas for 2000 and 2001 at zero, in response to the Ninth Circuit Court's ruling on the 1997 EA). NOAA's action in 1998 was challenged by plaintiffs in the Metcalf case and upheld by the District Court. The District Court's ruling on the claim under the Whaling Convention Act was not disturbed by the Ninth Circuit.*

*Commenters who believed the Background section was biased or inaccurate may be interested in a response by the Secretary of the IWC, Dr. Nicky Grandy, to an inquiry about the IWC's actions regarding the gray whale aboriginal subsistence quota. Dr. Grandy noted that the IWC can only set catch limits for stocks of whales, not for individual whaling operations or specified native peoples. Her response further clarifies that if more than one group wants to catch whales from a stock, the interested governments negotiate the means to ensure that the total catch limit is not exceeded. Dr. Grandy then summarized the events at the 1996 and 1997 annual meetings, and added the following comments:*

- IWC did not explicitly give permission to the Makah to kill gray whales – the IWC agreed to the catch limit proposed jointly by the US and the Russian Federation; it is the responsibility of the countries involved to ensure that the IWC regulations are observed.*
- The IWC catch limits agreed for the eastern North Pacific stock of gray whales does not mention the Makah specifically since, as explained above, catch limits are agreed for stocks and not for individual whaling operations or specified native peoples.*
- While the IWC did not explicitly sanction the Makah hunt, neither did it explicitly refuse to accept the Makah hunt as an aboriginal subsistence whaling operation. The IWC received a report of the 1999 kill by the Makah. There were no claims that an infraction had taken place. There is thus a de facto acceptance of this hunt as falling within the IWC's requirements for aboriginal subsistence whaling, although I might add that there is a degree of hesitation by some of the IWC members as reflected in the [Chairman's Report for the 1997 annual meeting]. The onus on designating the Makah hunt an aboriginal subsistence hunt was ultimately left to the US.*

*Dr. Grandy's letter is attached to this Appendix.*

2. The IWC recognized aboriginal subsistence whaling as an exception to the global ban on whaling only to the extent that the subsistence whaling was practiced at the time the ban went into effect (1986), and since the Makah have not hunted since 1920 they are not qualified for this exception.

*The comment offered no support for the statement that the commercial moratorium exempts only aboriginal subsistence whaling being practiced in 1986. NMFS believes that the statement is incorrect. The Commission treats the two types of whaling separately, and considers the moratorium inapplicable to aboriginal subsistence whaling.*

3. Documents obtained during the court case make clear that the United States merged the gray whale quota request with that of the Russian natives for the express purpose of avoiding a definitive ruling by the IWC of the Makah's purported need to take whales.

*The gray whale request was made jointly with the Russian Federation to ensure that any quota set would not be exceeded through lack of coordination between the two Native groups requesting an aboriginal hunt on gray whales. As there was no precedent for requests from two groups for harvest of the same stock, and the quota could not be assigned to any one country or group, the joint request was procedurally appropriate and resulted in a lower annual quota than in previous years.*

4. The United States illegally traded five of the yearly Inuit quota of bowhead whales for five of the Russian native yearly quota of gray whales. This trade was illegal under CITES and under the ICRW. The U.S. quota for the gray whales legally belongs to the Inuit.

*There was no "trade" between the two countries. In 1997, Native groups from the United States and the Russian Federation were interested in hunting gray and bowhead whales. As is explained in the EA (Section 2.3), based on the subsistence needs of these two groups, the Russian Federation and the United States submitted to the IWC a joint request for 620 gray whales over a five-year period. Both countries also submitted a joint request for 280 bowhead whales, which was adopted by consensus.*

*As additional background, the "trade" that is prohibited or regulated by CITES involves the physical movement of animals or products from one jurisdiction to another. The Convention defines "trade" as "export, re-export, import and introduction from the sea."*

5. The IWC has no formal mechanism to resolve disputes in treaty interpretations. Strong evidence was presented in 1997 that the Chukotka natives were in dire need of whale meat for nutritional and subsistence purposes. The United States exploited the Chukotka natives in attempting to get an IWC quota for the Makah. If issuance of the quota in 1997 were postponed in order to get an outside legal opinion regarding the Makah request, the Chukotka would have had to forego a quota as well.

*It is correct that the IWC does not have a formal mechanism to resolve disputes in treaty interpretation. The IWC chose to respond to the joint request by setting a block quota rather than by seeking an outside legal opinion. See Appendix 10.2.*

6. The Draft EA states that the IWC “approved the joint request for the aboriginal subsistence use of gray whales by consensus, without objection”. This ignores the considerable controversy associated with this request which should at least be acknowledged in Section 2.3. NMFS should replace this section of the EA with quotes from the IWC deliberation to allow an objective evaluation of the intent of the 1997 vote.

*Relevant text from the IWC Report of the 1997 Annual IWC meeting is included in Appendix 10.2 of the Final EA.*

7. At the 1997 annual IWC meeting, the U.S. delegation pressured Australia to drop proposed wording about having subsistence and cultural needs recognized from a motion to amend subparagraph (13)(b)(2) of the schedule.

*During discussions at the 1997 IWC meeting, the United States agreed to insertion of the words “whose traditional aboriginal subsistence and cultural needs have been recognized,” into the Schedule but objected to the additional phrase “by the IWC” because the IWC recognizes such needs only by setting an aboriginal subsistence whaling quota in response to a request.*

8. The Draft EA implies that, because the IWC made no change to the IWC quota nor took any other action in response to the 1999 take of a gray whale by the Makah Tribe, one can assume that the IWC accepts the decision of the United States to allocate a whaling quota to the Makah Tribe. This statement is invalid. In fact, the U.S. delegation to the IWC encouraged countries to refrain from raising the issue until the quota is again requested in 2002.

*If other IWC member countries had concerns about the Makah gray whale hunt or the IWC quota granted, these countries could have raised their concerns during the 1998, 1999, or 2000 meetings. In fact, no country raised such concerns either upon the unofficial report at the 1999 IWC meeting or upon the official U.S. report at the 2000 IWC meeting, of the 1999 gray whale take by the Makah Tribe. As indicated in the response to comment A-1, the IWC Secretary has noted that the fact that the issue had not been raised since 1997 indicates that there has been “de facto acceptance of this hunt as falling within the IWC’s requirements for aboriginal whaling,” despite the concerns raised during discussions at the 1997 meeting. The U.S. delegation has never discouraged other countries from raising the issue.*

9. The U.S. delegation failed to mention in its response to Sweden in the working group on whale killing methods at the 2000 annual IWC meeting that the timing of the hunt did not coincide with the migrations, and that it is possible that the whales killed would be resident whales.

*The gray whale hunt in 1998, 1999, and 2000, was structured with the intent of targeting migrating whales. As the U.S. delegation explained at the 2000 annual IWC meeting, this was accomplished by setting time and area restrictions using the best available scientific information. Recent scientific information indicates that the expected period for the migration off Washington is the beginning of December to the beginning of June. NMFS has incorporated this recent information in the EA.*

10. Section 2.3 of the Draft EA does not discuss why NOAA and the Makah Tribe decided to withdraw the request in 1996 and to resubmit it in 1997. The Final EA should include discussion of this, as it is highly relevant to an objective consideration of what the IWC agreed in 1997. The EA should clearly state that the United States withdrew the Makah proposal at the IWC in 1996 because of substantial opposition questioning the need for nutritional subsistence.

*Changes have been made to Section 2.3 of the EA to address this concern. In addition, relevant text from the IWC report of the 1996 Annual IWC meeting is included in Appendix 10.2.*

11. The EA fails to mention the 1995 IWC meeting where the Makah were denied a hunt.

*The United States did not request a gray whale quota from the IWC in 1995. The Makah Tribe contacted the U.S. Government in 1995 regarding its interest in obtaining an aboriginal quota, but did not do so in time to propose a Schedule amendment under the IWC's Rules of Procedure.*

12. The Draft EA states that “Denying a quota would be inconsistent with the IWC objective for the management of whale stocks subject to aboriginal subsistence whaling” and that “failing to issue the Makah Tribe a quota” may be viewed by some “as a unilateral move by the United States contrary to the IWC action.” The IWC authorizes catch limits but does not compel parties to avail themselves of those limits.

*Based on the gray whale quota granted in 1997, as discussed in the response to comment A-1, NMFS believes that allocating a quota is consistent with the IWC objective for the management of whale stocks subject to aboriginal subsistence whaling. NMFS has clarified in Section 5.4 that some countries could view denial as a unilateral move by the United States to deny an allocation of whales to a group whose subsistence and cultural needs have been recognized.*

13. Absent a valid subsistence need, the U.S. Government is required to prohibit its citizens from whaling based on the 1946 International Convention for the Regulation of Whaling. The U.S. Government is presently acting illegally and in violation of its obligations as a member nation of the IWC.

*See response to comment A-1*

14. By allowing the Makah Tribe to conduct a hunt, the United States violated the IWC moratorium.

*See responses to comments A-1 and A-2.*

15. By allowing the Makah to hunt, the United States betrayed its allies in the IWC and caused the United States to become a whaling nation.

*See response to comment D-0.*

16. The Draft EA states that Alternatives 1 and 2 would “send the signal that it is possible to carry on traditional whaling that is sanctioned by the IWC.” This statement is not applicable since the Makah hunt is not sanctioned by the IWC.

*See response to comment A-1.*

17. It should be noted that the Russians have expressed their intention to increase their quota request due to the 10 whales killed in 1999 which could not be used due to a “strong, disgusting smell”.

*The U.S. view, undoubtedly shared by most other IWC members, is that landed whales must be counted against the quota, whether edible or inedible. The United States is cooperating with the Russian Federation to investigate the cause of this phenomenon.*

## Section B - Subsistence

1. How can the Makah hunt be considered a subsistence hunt when the Tribe has not hunted whales for over 70 years?

*While it is true that the Makah Tribe had not engaged in active whaling for 70 years, NMFS believes that the Tribe has had a continuous dependence on whaling as a source of community pride and social cohesiveness. Despite the lack of active whaling, the Tribe has depended on its tradition of whaling as a means to identify with its past and to keep its community together. The Makah have never forgotten the importance of their whaling tradition and it has remained central to their culture. Furthermore, there were many external factors that led to the cessation of whaling by the Makah, including the depletion of whale stocks and government actions to suppress Makah traditions. See response to comment B-2 for further discussion of subsistence need.*

2. “Subsistence” implies just eking out an existence, or as the dictionary states, living at a level “just barely able to sustain life.” The Makah Tribe doesn’t meet this definition.

*The term “subsistence” embraces a broad range of activities, all of which are essential to sustain a community. Although nutrition and the satisfaction of eating traditional foods may satisfy one form of subsistence needs, these are not the only requirements for subsistence of a community. There are other factors that contribute to the subsistence tradition of a community. These factors, which the United States raised during IWC discussions of early aboriginal subsistence quota requests, include: (1) participating as a community in a cooperative activity; (2) kinship-based crews; (3) processing and preserving the harvest in accordance with traditional social roles; (4) sharing and distributing the harvest within the community according to complex kinship networks; (5) social integration within the community; (6) transferring knowledge about the harvest from generation to generation; (8) obtaining additional marine resources from the same ancestral waters; and (9) cultural autonomy. Moreover, in an IWC context, subsistence implies a non-profit driven motive for hunting whales.*

3. The Draft EA neither presents documentation nor examines the actual nutritional needs of the Makah.

*The Makah subsistence need statement which was presented to the IWC in 1997 included extensive justification of the needs of the Makah to take gray whales, including discussion of the nutritional benefits of the subsistence hunt. The IWC granted the gray whale quota on the basis of this needs statement.*

4. The EA fails to mention the fact that the Makah did not traditionally use the gray whale for food, but

instead for oil. How can the gray whale hunt be termed subsistence when they were never used for subsistence in the past?

*Historically, the Makah Tribe used whales for both subsistence purposes and for important trade items for barter with other tribes. Section 4.4.1 of the EA has been expanded to clarify this point. The Makah Tribe has committed to limit its whaling to aboriginal subsistence whaling, which has no commercial aspects.*

5. The EA does not mention the fact that the tribe is divided on the issue of Makah whaling.

*The U.S. Government works with the Makah Tribe on a government-to-government basis. The Makah Tribe is represented by a democratic Tribal Government, headed by the Makah Tribal Council. Elected members of the Makah Tribal Council represent Makah Tribal members. As is the case with all democratic government systems, not every citizen will always agree with those who are elected. Nonetheless, the Makah Tribal Council makes decisions on behalf of tribal members. The EA correctly portrays the position of the Makah Tribal Council, which remains in support of the aboriginal subsistence hunt despite changes in the Council's composition since 1997.*

6. Because of the Government's recognition of the IWC as the primary international decision making body on the whaling issue, it is the IWC's determination of the "needs" of an aboriginal group that must dictate whaling practices by the Makah. There was never a "subsistence need" directly recognized or sanctioned by the IWC. There was never documentation of a "continuous" tradition of whaling or a nutritional need. These are the two IWC criteria, and the Makah do not meet either one. The heads of several delegations and the IWC Secretary at the time have stated that the subsistence needs of the Makah were not met. This is noted in the Chairman's report of IWC 49.

*As explained in the response to comment A-1, the IWC recognized the needs of the Makah Tribe by granting the gray whale quota in 1997. Prior to the approval of the quota in 1997, there was considerable discussion regarding the needs of the Makah Tribe. A summary of these discussions from the 49<sup>th</sup> annual IWC meeting in 1997 is included in Appendix 10.2.*

7. The Draft EA implies that the failure of the Makah to meet the strict IWC guidelines for aboriginal subsistence is a minor and irrelevant issue. This undermines the effectiveness of the ICRW.

*The Draft EA does not imply that the Makah fail to meet the IWC guidelines for aboriginal subsistence whaling. As described in the response to Comment A1, NMFS believes that the Makah Tribe meets the IWC guidelines for aboriginal subsistence whaling. This belief was reaffirmed when the IWC recognized the needs of the Makah Tribe by granting the gray whale quota in 1997.*



8. The statement in the EA “There is no definition of aboriginal subsistence whaling, only technical working group guidelines that have never been adopted” is false. The Ad Hoc Technical Committee for the IWC agreed to the following definition in 1981. They are as follows: “Aboriginal subsistence whaling means whaling, for purposes of local aboriginal consumption carried out by or on behalf of aboriginal, indigenous or native peoples who share strong community familial, social and cultural ties related to a continuing traditional dependence on whaling and on the use of whales. Local aboriginal consumption means the traditional uses of whale products by local aboriginal, indigenous or native communities in meeting their nutritional, subsistence and cultural requirements....” Clearly the Makah do not fit this category.

*The Ad Hoc Technical Committee agreed to the quoted text, but it was never adopted by the Commission. The EA has been revised to clarify that the Commission has never adopted the guidelines. As discussed in the response to comment A1, the IWC recognized the subsistence needs of the Makah through the granting of the gray whale quota in 1997. The granting of an IWC quota is the only mechanism by which the Commission recognizes the needs of an aboriginal needs and determines that a particular use of whales is consistent with the aboriginal subsistence guidelines.*

9. The U.S. Government claims that the IWC has no established mechanism for recognizing the subsistence needs of any aboriginal group other than through the approval of a quota and implies that Aboriginal Subsistence Whaling is a vague or ill-defined category of the IWC. Considering the multiple U.S. statements in recognition of the role of the IWC in management of whales and in the regulation of aboriginal subsistence whaling, the Government cannot seriously be claiming that the IWC does not have the ability, means, or standards necessary to recognize the subsistence needs of an aboriginal group.

*The U.S. Government recognizes the IWC as the global authority for management of whales and the regulation of aboriginal subsistence whaling. The IWC’s mechanism for recognizing the subsistence needs of any aboriginal group is to approve a quota based on the request of a member nation on behalf of the aboriginal group. The IWC in 1997 approved a quota based on the joint request of the Russian Federation, on behalf of the Chukotka, and the United States, on behalf of the Makah.*

10. The Draft EA states in Section 2.3 that “Approval of the quota ... is the only mechanism by which the IWC recognizes the needs of an aboriginal group. The Resolution passed in 1997 by the IWC states that the eastern Pacific stock of gray whales may only be hunted by “those whose traditional aboriginal subsistence and cultural needs have been recognized.” Why would the resolution state the quota may only be taken by a group whose needs have been recognized, if passage of the resolution on the quota in and of itself constituted such recognition?

*The record is unclear as to the purpose of the phrase that was added to paragraph 13(b)(2); note*

*that the amendment originally ended with the words “recognized by the IWC,” but that “by the IWC” was dropped. Some have interpreted the amendment to require recognition by the member nation that authorizes the aboriginal group to conduct a subsistence harvest. A summary of the discussion of this issue at the 1997 annual IWC meeting is included in Appendix 10.2.*

11. The 1997 EA stated that the IWC first assesses the need of an aboriginal group for whales, then sets a quota. However in the current EA it states that approval of the quota is the only mechanism by which the Commission recognizes the needs. The Agency clearly changed its position based on the fact that the Makah were unable to establish a subsistence need for whales. Contrary to the Draft EA, the IWC does require the Makah to prove a subsistence need.

*The statement in the 1997 EA that the IWC first assesses the need of an aboriginal group for whales, then sets a quota, is correct. The 1997 EA goes on to state that, provided the need is accepted by the IWC, the IWC then sets quota for aboriginal subsistence use. This is consistent with the statement in the Draft EA that approval of the quota is the only mechanism by which the Commission recognizes the needs of an aboriginal group. The difference in wording was not a change in position. In fact, the two statements are consistent.*

12. NOAA recognizes that the Makah do not meet IWC subsistence guidelines. This is evident from internal emails where NOAA officials searched for quotas that were granted without a needs statement.

*NOAA believes that the Makah Tribe meets the IWC guidelines for aboriginal subsistence whaling. This belief was reaffirmed when the IWC recognized the needs of the Makah Tribe by granting the gray whale quota in 1997. The internal emails referenced in the comment involved discussion of two attorneys in preparing a response to the charge in an amicus brief that the IWC only allows aboriginal subsistence whaling where the requester has complied with strict requirements to demonstrate cultural and subsistence needs. As a result, the two attorneys were discussing instances, such as that of St. Vincent and the Grenadines, in which IWC member countries were granted aboriginal subsistence quotas without providing a detailed statement of need.*

13. Other aboriginal quotas have been based on extensive documentation of need, with the statements of Commissioners reflecting support for the quota. Needs statements have always been the foundation for requesting aboriginal subsistence quotas; the implication that the IWC can recognize an Aboriginal Subsistence Whaling claim without an approved needs statement sets a dangerous precedent.

*NMFS believed that it was important to submit a needs statement in 1997 to describe the aboriginal subsistence needs of the Makah. Based on information provided in this document, the IWC approved a quota as requested by the United States and the Russian Federation. While NMFS believes IWC member countries should submit needs statements, it is untrue that needs*

*statements have always been the foundation for requesting aboriginal subsistence quotas. At the 1996 IWC meeting, St. Vincent and the Grenadines requested and received an aboriginal subsistence quota without documentation of need.*

14. The word “adequate” in Section 2.3 referring to the Makah Tribe’s needs statement must be removed because that statement does not quantify nutritional need or deficiencies.

*NMFS believes that the term “adequate needs statement” in Section 2.3 is appropriate. The needs statement presented to the IWC specifically discusses the nutritional benefits to the Makah Tribe of the gray whale subsistence hunt.*

15. The Draft EA claims that the 1996 revision to the whaling regulations at 50 CFR Part 230 was solely to set up a mechanism to implement the IWC decisions. The IWC guidelines refer to the “traditional use of whale products by local aboriginal, indigenous, or native communities in meeting their nutritional, subsistence, and cultural requirements.” The U.S. regulations are noticeably different only referring to groups who have been “recognized by the [IWC] as having a cultural and/or subsistence need.” The insertion of the term “or” into the federal regulations was an effort to weaken federal implementation of the ICRW.

*The 1996 revisions to the whaling regulations at 50 CFR Part 230 are consistent with the ICRW.*

16. Section 2.2 of the Draft EA states “The ICRW specifically states that the IWC may not allocate specific quotas to any particular nationality or group of whalers.” Contrary to this statement, the ICRW does not refer to any particular nationality or group of whalers, only provides that specific quotas cannot be allocated “to any factory ship or land station or to any group of factory ships or land stations.” The United States exploited this provision of the ICRW, which was intended to apply to commercial whaling. The statement in the Draft EA should be corrected or withdrawn.

*The former Secretary of the IWC interpreted the Convention to preclude allocation of quotas to any particular nationality or group of whalers, both for commercial or aboriginal subsistence whaling. The U.S. Government proceeded with the request for a gray whale quota consistent with the Secretary’s advice.*

17. The U.S. Government maintains that the IWC may not issue quotas to any particular group or nationality, yet the record indicates that the U.S. Government sought exactly that at the 1997 IWC meeting and the Draft EA repeatedly states that the “IWC granted the Makah Tribe a quota”.

*NMFS agrees that it was inaccurate in the Draft EA to state that the “IWC granted the Makah Tribe a quota.” The text in the Final EA has been corrected to clarify that the IWC granted a gray whale quota based on a joint request from the United States and the Russian Federation.*

18. As is apparent from the IWC website, the IWC does, in fact, specify quotas based on nationality. For example, the website indicates that a limit was agreed for the “Bering-Chukchi-Beaufort Seas stock of bowhead whales (taken by Alaskan Eskimos and native peoples of Chukotka).”

*The IWC website accurately lists the quotas that have been approved by the IWC. The website shows that the IWC granted quotas for specific stocks and indicates in parenthesis the member countries on whose behalf the quotas were approved.*

19. The Government’s failure to seek a straight vote on the Makah’s needs contradicts its own statements in the Administrative Record in Metcalf v. Daley that it would seek a “definitive ruling” from the IWC on “how well Makah whaling fits the IWC definition of aboriginal subsistence whaling.”

*The statements from the Administrative Record are taken out of context. The entire passage reads:*

*The IWC has allowed aboriginal subsistence whaling under widely differing circumstances that show significant flexibility on the part of the IWC. NMFS understands that many disagree with its conclusion that Makah whaling fits squarely the IWC guidelines for aboriginal subsistence. NMFS notes that the only way to determine positively whether Makah whaling does qualify is to obtain a definitive ruling from the IWC itself. Unless the IWC determines that Makah whaling does not fit the aboriginal subsistence whaling guidelines, NMFS will maintain its present view.*

*Since the IWC set a quota based on the joint Russia-U.S. request, and made no determination that the Makah were not entitled to partake in the quota, NOAA considers that the IWC action was “definitive.”*

20. Since the Makah have various ceremonies associated with whales and whaling, it is unclear why some or all of those ceremonies cannot take place independent of the killing of a whale in order to meet the tribe’s interest in sustaining its traditions, culture, and ceremonies.

*The whaling traditions of the Makah Tribe are centered around the hunting of the gray whale, including the training for the hunt, the hunting and killing of the whale, and the butchering and consumption of the whale through tribal ceremonies and celebrations. The harvesting of whales is a crucial part of restoring this tradition.*

21. The Makah have claimed that a return to whaling will reinvigorate traditions associated with whaling; however, it is unclear whether all of the whaling traditions are being followed.

*The Makah Tribe’s return to whaling has and will continue to reinvigorate traditions associated with whaling. NMFS is aware that the Makah Tribe has worked closely with Makah elders and*

*with historians and cultural anthropologists to learn more about the many aspects of its whaling tradition. The Makah Tribe has used this knowledge to revive many of the traditions surrounding the whale hunt. NMFS believes that it is not necessary, and may not be feasible, for the Makah Tribe to engage in all of its whaling traditions. For example, NMFS has encouraged the Tribe to conduct the hunt using modern weaponry, rather than traditional harpoons, to ensure that whales are harvested in a humane manner.*

## Section C - General Comments on EA / NEPA Requirements

1. Use of data that is “in press” and “in prep” in the Draft EA was inappropriate. If used, these should have been included in the EA.

*CEQ guidelines require agencies to use the best available scientific information, as long as the information is credible science relevant to the analysis, based upon theoretical approaches or research methods generally accepted in the scientific community. We have determined that the information in press or in prep meets those standards.*

2. NOAA should have had an outside contractor prepare the EA to ensure objectivity.

*The agency is responsible for the evaluation of environmental issues and takes responsibility for the scope and content of the EA regardless of whether the EA is prepared by a consultant or the agency.*

3. The Agency should have arranged for an independent review by scientific experts on the resident whale issue (like Drs. Darling and Calambokidis) who NMFS conceded are recognized experts on this issue.

*NMFS scientists considered the best available information, including papers authored by the scientists mentioned, in preparing the EA. NMFS also solicited comments on the Draft EA, thus providing an opportunity for other scientists to comment on the EA and its conclusions.*

4. NOAA’s objective as stated shows the inherent bias and does not mention MMPA, NEPA, or the ICRW.

*NMFS believes that the Final EA correctly reflects the U.S. Government’s responsibilities to recognize treaty rights to the fullest extent possible, while still allowing for the conservation of the gray whale. NMFS’ objective is to be consistent with relevant laws and has revised the objective to reflect this, thus stating, “to the fullest extent possible consistent with all applicable law.” The analysis was conducted within the context of all applicable laws. See Section 2.5 for a discussion of legal issues.*

5. The Draft EA fails to take the comprehensive “hard look” mandated by law and the 9<sup>th</sup> Circuit Court and has not been undertaken in good faith. The Agency should embark on a new NEPA process, preferably, preparing a full EIS but, at a minimum, preparing a new Draft EA.

*By following the procedures in the NEPA process, NMFS is fully aware of the impact of this decision. The EA was completed in such as manner as to provide decisionmakers with enough information to make a substantive decision in light of the environmental consequences, made*

*this information available to the public, and encouraged public participation. NMFS believes that the Final EA takes a comprehensive look at the issues and has determined that the proposed action will have no significant impact as outlined in Section 6 of the Final EA.*

6. The Draft EA fails to discuss the option of allowing a take of fewer than five whales per year.

*The Draft EA discusses the impacts of allowing up to five gray whales killed per year. NMFS determined in drafting the Draft EA that it would be most conservative to evaluate the maximum level of take possible, which is a take of five whales per year.*

7. The Draft EA states that Alternatives 1 and 2 would “send the signal that it is possible to carry on traditional whaling that is sanctioned by the IWC.” The “sending of signals” should not be a function of the Agency or the EA.

*NMFS has modified the EA in response to this comment. NMFS has clarified in the discussion of Alternatives 1 and 2 that these alternatives would make it possible to carry on aboriginal subsistence whaling that is sanctioned by the IWC.*

8. The Draft EA focuses too much attention on the impact that the hunt would have on the Makah Tribe rather than the gray whale and the environment.

*The Draft EA and Final EA include a comprehensive assessment of the potential impact on the gray whale and the environment. In addition to this assessment, both documents appropriately include discussion of the potential impacts on the Makah Tribe and on the human environment, as required under NEPA.*

9. The rushed preparation of this Draft EA is contrary to the opinion of the 9<sup>th</sup> Circuit and indicates a desire to issue it before the Bush Administration could review it.

*NMFS did not rush the preparation of the Draft EA. Since the June 2000 appeals court ruling, NMFS prepared and published the Draft EA independent of any political considerations concerning the incoming administration. NMFS provided a 30-day comment period to provide an opportunity for the public to review and comment on the document. The Final EA is being issued under the Bush Administration.*

10. NMFS should explain why there were such substantial changes in whale hunting practices proposed in Alternatives 2 and 3 compared to all alternatives considered in the past.

*NMFS believes that the EA analyzes a reasonable range of alternatives and discusses all relevant components of those alternatives and issues addressed in the past. Alternatives 2 and 3 introduce the possibility of a hunt targeted on the Pacific Coast feeding aggregation because of*

*the new information available on gray whales and, specifically, because there is no conservation necessity to limit the hunt to migrating gray whales.*

11. Under Alternative 3, it is unclear why granting the Makah a quota would promote cultural diversity. It could arguably promote cultural divisiveness, not diversity.

*Under Alternative 3, it was NMFS' intention to indicate that granting the Makah Tribe a quota for aboriginal subsistence whaling would represent acknowledgment of not only their treaty right but also of their unique culture and traditions. NMFS recognizes the public controversy regarding this issue and agrees that granting the Makah a quota may increase concerns of those who oppose Makah whaling.*

12. Selection of Alternative 3 would result in a strong public opposition from members of the public.

*NMFS recognizes that Alternative 3 in the Draft EA would be least acceptable to those who oppose whaling by the Makah Tribe.*

13. The statement that the No Action Alternative would have the “worst consequences” for the Makah Tribe is without merit. It is possible that the Tribe would benefit from the No Action Alternative.

*NOAA has revised Section 5.6 in response to this comment.*

14. It is unclear why under Alternative 4 NMFS believes that “cooperative research efforts between the Tribe and NOAA ...could be jeopardized.”

*NMFS is involved with many cooperative research efforts with the Makah Tribe. While NMFS cannot anticipate the Tribe's reaction if the U.S. Government does not grant the Makah Tribe a quota, NMFS expects that this alternative would result in reduced cooperation between NMFS and the Tribe, and that the Tribe may view these cooperative efforts less favorably than in the past.*

15. The discussion under Alternative 4 fails to discuss the benefits of not killing whales.

*The environmental consequences of the Makah hunt are discussed under Section 5 of the Final EA. As outlined in this section, NMFS does not believe that the proposed action would have significant adverse impacts on gray whales or other species; conversely, the increased environmental benefits of not proceeding with the proposed action are minimal.*

## **NEPA**

16. NEPA requires agencies to identify a proposed action in any draft environmental document (40



CFR §1502.10), thus the Draft EA was in violation of NEPA in this regard.

*There is no requirement under NEPA or CEQ implementing regulations to circulate a Draft EA or to identify a proposed action if the purpose is to gather public comments on a range of alternatives. NOAA chose not to select a preferred alternative until it could consider public comments on the four alternatives identified in the Draft EA.*

17. The Draft EA should have included discussion of how the Agency decided to do an EA rather than an EIS. An EIS is required in this case under NEPA.

*The primary purpose of an EA is to determine whether a proposed action could have significant impacts requiring an EIS. After completing the EA, NOAA determined that the proposed action will not have significant impacts requiring an EIS. The determination that the impacts are not significant is documented in the Finding of No Significant Impact (FONSI).*

18. The law says that in determining if an EIS is required the Agency must analyze the impacts of its proposals on “society as a whole, and the affected region.” Agencies are also mandated to consider to what degree the effects on the human environment are highly controversial and precedent-setting. NMFS has not determined what effects its decision will have on the people and economy of the Olympic Peninsula.

*This EA has analyzed the impacts on the society as a whole and the effected region. NOAA recognizes that many individuals and groups do not want the Makah Tribe to hunt gray whales. However, while there is public disagreement about the right of the Tribe to exercise its treaty right to hunt whales, NOAA has not discerned any scientific controversy about the impacts to the stock of eastern North Pacific gray whales. See the sections and comments concerning socio-economic impacts, other tribes, and safety for analysis of effects on the people and economy of the Olympic Peninsula.*

19. The EA is replete with unsupported assertions and opinions that prevent the public from participating in the agency’s decision to the extent required by NEPA. The EA lacks the information necessary (40 C.F.R. 1500.1(b)-(c)) to make decisions that are necessary to determine all the environmental consequences.

*The Final EA contains additional and improved information in order to provide the public the best and up-to-date information available. NOAA believes this EA provides the information necessary to fully analyze this decision.*

20. The Agency fails to evaluate the “cumulative effects” as required by NEPA. The cumulative analysis must be contained in the draft document so that the public can consider such evidence. Inserting a cumulative impact in a Final EA would not satisfy NEPA requirements.

*The Draft EA included information on many effects on the gray whale population such as whaling, natural mortality, fishery interactions, offshore activities and shipstrikes, contaminants, and strandings. The Final EA contains revised analysis on these issues and contains additional information included in response to public comments. NOAA determined that the cumulative effects of these impacts are not significant.*

21. The misrepresentation at the IWC of what constitutes a subsistence need is likely to cause significant impacts on other whale species by undermining an international whale conservation agreement. Under NEPA, this undermining of the definition and likely consequences would be categorized as an indirect effect caused by an action which is reasonably foreseeable (40 CFR 1508.8(b)).

*NMFS' support of a quota for the Makah Tribe at the IWC is consistent with long-standing U.S. policy of supporting aboriginal subsistence whaling and does not undermine any part of the ICRW or U.S. position in the IWC. See responses to comments B-7 and C-1.*

22. The EA fails to analyze both the "context" and "intensity" as required (40 C.F.R. 1508.270) to determine if an EIS is required. As to "context," the agency must consider impacts to "society as a whole, the affected region, the affected interests, and the locality." As to intensity, the agency must consider whether the action involves "unique characteristics of the geographic area such as proximity to historic or cultural resources." This has not been done.

*In the Final EA, both long- and short-term effects have been analyzed for the full range of issues and locales including impacts on the gray whale stock; stocks of other species including fish, birds, and mammals; the Makah Tribe; other tribes; whale watching operations; and safety of local citizens. Intensity has been evaluated with regard to all ten components of intensity described in 40 CFR 1508.27, including with regard to historic and cultural resources. Most notably, see the sections on the Olympic Coast National Marine Sanctuary and Wildlife Refuges.*

23. The Draft EA fails to discuss the impacts of Makah whaling on non-protesting individuals (including children) who may witness a whale being killed. This is a potential impact to the human environment which must be considered under NEPA.

*NOAA recognizes that many individuals may not want to witness a whale hunt. NMFS does not believe, however, that this is an impact that must be considered in the EA. See also the response to comment J1 and Section 5.11.*

24. The EA does not conclude one way or the other whether the proposal will have a significant effect on the environment as mandated by regulations.

*The Draft EA discussed and analyzed a range of alternatives. The determination whether*

*alternatives will have a significant impact on the environment was not made until after the final document was prepared. In this case, NMFS determined from the Final EA that the proposed action will have no significant impact.*

## Section D - Comment Period / Public hearing

1. Why did NMFS only allow a 30-day comment period? Thirty days is not sufficient time to analyze the legal and scientific issues.

*NEPA regulations do not require agencies to allow for public comment on an environmental assessment; 40 CFR 1501.4(b) states that agencies should involve the public to “the extent practicable in preparing [environmental] assessments.” NMFS decided to provide for a public comment period to allow the public an opportunity to review and provide comments on this document. NMFS believes that a 30-day comment period, including one public hearing, provided adequate opportunity for public comment.*

2. The abbreviated public comment period in this case strongly indicates a determination by NOAA/NMFS to issue a FONSI prior to the start of the spring gray whale migration so that the Makah may resume hunting immediately.

*NMFS did not consider the 30-day public comment period to be an “abbreviated comment period.” As explained in the response to comment D-1, NMFS went beyond the requirements of NEPA and CEQ regulations in allowing for public comment on the Draft EA. At the time that the Draft EA was completed, NMFS had not yet determined whether a FONSI would be made or whether an EIS would need to be prepared. NMFS had not made determinations as to when the analysis would be completed nor had it decided whether the Makah Tribe would be issued a quota to resume its hunt in 2001 and 2002.*

3. Why did NMFS conduct the public hearing in Seattle, and not on the Olympic Peninsula, or better conduct two public hearings?

*NMFS was not required to hold a public hearing on the Draft EA, but chose to do so to allow additional opportunity for the public to provide comments. NMFS wanted to select a site or sites for the public hearing that would be most conducive to allowing individuals to present their views without disruption. NMFS was advised by local government officials that Port Angeles, WA, was not suitable for providing a secure environment for this purpose.*

4. The public hearing held on February 1<sup>st</sup> was biased towards the Makah tribe. The hearing opened with many Makah being allowed to talk during the time supposedly reserved for public officials. They were not public officials. The Makah were allowed to speak for the first hour, roughly one-third of the scheduled meeting time.

*NMFS’ February 1, 2001, public hearing on the draft Makah EA was conducted in a similar manner to other NMFS public hearings in that government representatives are routinely offered*

*the opportunity to provide comments at the beginning of the event. In this case the Tribal government selected its representatives. All comments were given equal consideration no matter whether they were presented at the beginning of the hearing or at the end, and please note that we extended the hearing until every citizen and group who wished to speak were given an opportunity to do so.*

## **Section E - Commercial Whaling Interests**

1. A Makah subsistence harvest undermines the IWC and CITES and has led to increased whaling worldwide. This is evident by Japan's expansion of its research whaling program, Japan's continued effort to obtain a quota for small-type coastal whaling, Norway's and Japan's efforts to downlist whale populations in CITES, Norway's continued commercial harvest and intention to export whale products, the IWC's failure to adopt a South Pacific Sanctuary, progress on the Revised Management Scheme, Japan's lifting a ban on the hunting of bottlenose whales, and the establishment of the World Council of Whalers.

*NOAA does not perceive any causal connection between U.S. support of the Makah harvest and decisions by other governments or international organizations. The United States has long supported aboriginal subsistence whaling, and has submitted requests for bowhead quotas for use by the Alaska Eskimo Whaling Commission for more than two decades. The addition of a second aboriginal group has not affected the U.S. delegation's positions on research whaling, commercial whaling or international trade in whale products, CITES downlistings, whale sanctuaries, or any other issue. The U.S. delegation continues to work constructively and effectively with other IWC and CITES delegations on these matters.*

2. The Makah are intending to pursue commercial whaling. Public statements by the Makah and even the Makah Tribe's Whaling Proposal of May 5, 1995 indicate that they believe they have the right under the treaty to harvest whales for commercial purposes. The EA ignores this fact and does not consider this an interim step toward commercial whaling, as the Makah request states.

*This EA covers the effects of granting or denying aboriginal subsistence whaling quotas for 2001 and 2002 only – a time period during which the Makah Tribe intend to limit any whaling to cultural and subsistence purposes. What the Tribe might seek in the future, and how the U.S. Government might react to a completely different proposal, are matters of speculation.*

3. The Final EA should discuss the Makah's public statements that they wish to conduct commercial hunts for several species of marine mammals (including cetaceans, seals, sea lions, and sea otters) and to build a processing plant on the reservation. While this Draft EA is an assessment on the environmental impact of the gray whale hunt, the Makah's interest in harvesting other marine mammals is highly relevant to any environmental analysis.

*NMFS is not aware of any intention by the Makah Tribe to begin harvesting additional species of marine mammals in the near future. Furthermore, this EA is limited to the environmental impact of a subsistence hunt on gray whales for the years 2001 and 2002.*

4. The Draft EA fails to mention that the gray whale was taken off the Endangered Species list upon the urging of the Makah.

*Section 4.2 of the Final EA has been revised to indicate that the Makah Indian Tribe supported removal of the gray whale from the list of endangered species. In addition, NMFS has clarified in Section 2.1 of the Final EA that the Tribe believes it has the right under the Treaty of Neah Bay to conduct commercial whaling, but confined its request to NOAA to a ceremonial and subsistence harvest.*

5. The Agency misled the IWC regarding the Tribe's ongoing interest in commercial whaling, despite the documentation of the Makah's commercial interest.

*Prior to requesting a quota from the IWC, the Makah Tribe renounced any interest in commercial use of the products of the subsistence hunt through the year 2002. NMFS presented the IWC with documentation of the aboriginal subsistence need of the Makah Tribe and requested a gray whale quota on the Tribe's behalf for 1998-2002. The IWC granted the aboriginal subsistence gray whale quota on the basis of this documentation.*

6. The Final EA should make reference to any potential for renegotiation between the Makah and NOAA on the issue of commercial whaling by the Makah.

*The Tribe has renounced any interest in commercial use of the products of any subsistence hunt through the year 2002. Since commercial whaling is neither contemplated nor allowed under any of the alternatives, there is no need to address this issue further in the Final EA.*

7. The future whaling ambitions of the Makah tribe, including their commercial interests, must be considered before the U.S. Government proceeds. The U.S. Government should require that the Makah sign a contract forbidding any commercial whaling before proceeding.

*See response to comment M-7. NOAA and the Tribe had signed a cooperative agreement in 1997 that forbids any commercial use of the products of a subsistence harvest. That provision would be repeated in a new cooperative agreement, and appears in the Tribe's management plan.*

8. The Makah only agreed to temporarily forego commercial whaling based on a government promise that, in time, it would address the gray whale listing under CITES and take whatever other actions

necessary to accommodate the Makah's interest in commercial whaling. The government's position against downlisting from CITES Appendix I is contrary to its position allowing the Makah to hunt gray whales; the government may not adhere to its defense of the Appendix I listing if its ultimate objective is to allow the Makah to engage in commercial whaling.

*NOAA denies that any government official ever promised the Makah Tribe that the United States would take any action to facilitate commercial whaling by the Tribe. To the contrary, NOAA and other Federal agencies have made it clear to the Tribe that they would not support commercial whaling by any U.S. citizen. The U.S. position, articulated and strongly advocated at the last three CITES conferences, is that CITES should retain all whale populations on Appendix I at least until the IWC completes the Revised Management Plan for commercial harvest of baleen whales. There is no inconsistency between this position and support of an aboriginal subsistence harvest.*

9. The EA ignores well documented connections between the Makah Whaling Commission and commercial whaling interests in Japan and Norway. The EA ignores the fact that Japan supports Makah whaling because it supports their efforts within the IWC to gain a quota for their coastal populations, which may have a much stronger claim of cultural whaling than the Makah. The U.S. Government has created de facto support for a new category of "cultural" whaling. The statement in Section 5.1 ("On a broader scale, official recognition that traditional whaling activities such as whaling are culturally valuable, despite their controversial nature, would be reassuring to Native Americans in general") is dangerous.

*See response to comment E-1.*

10. The Draft EA ignores the fact that the World Council of Whalers proposed potlach ceremonies to enable the Makah to export whale parts to Canada where they could be sold on the world market. Why did NOAA fail to mention in the Draft EA the potential for the Makah's whaling to stimulate world trade in whale parts?

*Potlach ceremonies are a Makah Tribal tradition. As explained in the response to comment E-13, international trade in this meat would be a violation of domestic laws. The Makah Tribe's Management Plan requires that whale products be used exclusively for local consumption and ceremonial purposes and prohibits the sale of whale products, except that involving the domestic sale of traditional handicrafts.*

11. Meeting notes from April 1995 clearly illustrate the Agency's knowledge of the Makah's commercial interests. The Agency has attempted to defend this memo by claiming that either: 1) the information did not come from an official representative of the Tribe; 2) that the information was misinterpreted in the meeting; or 3) that the Makah have now promised not to whale commercially so the memo is irrelevant. It seems more than ironic that the Makah Tribe notified NOAA of their intent to

conduct a subsistence hunt just 8 days after this April 1995 meeting took place.

*The Tribe has renounced any interest in commercial use of the products of any subsistence hunt through the year 2002.*

12. The Draft EA does not address the likely prospect of whale meat from a Makah hunt being smuggled and sold to Japan for use in its domestic commercial markets. This is of particular concern given the Tribe's fishery contract with Supreme Alaska Seafoods, which is co-owned by a Japanese company that has been connected to whale smuggling operations. This company, Taiyo Fisheries Co., is also co-owner of the of the Japanese whaling fleet that whales under the guise of scientific research. These connections should be disclosed in the EA.

*NMFS has no reason to believe that meat from the aboriginal subsistence hunt would be smuggled and sold to Japan. This practice would be illegal and punishable under U.S. and Japanese law.*

13. The commercial use of whale products is forbidden in the United States. As a result, if the Makah Tribe were to kill whales for commercial purposes, the only option for the Makah Tribe would be to engage in international trade. This would be in violation of the 1855 Treaty of Neah Bay, where the Tribe is forbidden to trade outside the United States. This would violate domestic and international law and would violate the IWC's commercial whaling moratorium.

*NOAA agrees that the Tribe may not engage in international trade. The Makah Tribe does not intend to kill whales for commercial purposes during the subsistence hunt covered by the EA.*



## Section F - Gray Whale population and food supply

### Gray Whale Mortalities/Calving

1. The EA fails to take into account the alarming gray whale mortalities of the past years, 273 in 1999 and 291 in 2000 (up to June). It ignores that the IWC Scientific Committee moved ahead by a year a new assessment to 2002 of the gray whale stock due to the mortality and decrease in calving.

*The EA notes the stranding events in 1999 and 2000 (see Section 4.2.9) and low calving rates in these two years (see Section 4.2.1). The reported strandings were 5-13 times more than reported from other years, but it is not clear how much this has changed the latest available abundance estimate (from 1997/98). Section 4.2.9 includes comments from the Scientific Committee of the IWC regarding the high mortality rates. The strandings and reduced calf counts will not have changed the size of the entire population to the point that an allowance for a subsistence take of five whales would significantly harm the remaining stock.*

2. The 274 whales found stranded between December 1998 and September 5, 1999 may represent only the tip of the iceberg in terms of strandings. According to Heyning and Dahlheim (1994), the total number of undocumented gray whale mortalities could have approached 5,480 animals. There should be statistical criteria as to how many whales are represented by each whale found dead.

*Heyning and Dahlheim (in press [not 1994]) include data from 1975-89 only, not from 1999. However, these authors did estimate that less than 5% of all strandings are reported. This calculation was based on Reilly's (1987) total mortality estimates of 8% of all males and 5.4% of all females (i.e., 1,407 whales in 1987/88 when the abundance was 21,000 whales) relative to the number of stranding reports actually received. Since then, reporting rates have improved due to an improved stranding network from California to Washington and increased interest on the part of the public. Thus, it is likely that in 1999 and 2000, stranding rates represented well more than 5% of the total mortalities, that is, well less than 5,480 animals. There are many variables to consider in trying to correlate the number of strandings to the total number of mortalities in a given area for a specific period. For instance, some locations—such as California—have a high probability of reporting relative to each whale that strands, whereas other locations—such as Alaska and British Columbia—have a very low probability. Flotation of a carcass is affected by temperature, salinity, and blubber thickness; and whether or not the carcass reaches the shore is affected by sea currents, distance from shore, and coastal features.*

3. The Draft EA provides no information concerning strandings that occurred in the United States after June 10, 2000, or in Mexico after March 2000. The Final EA should include more recent information on gray whale strandings.

*The Final EA includes the most up-to-date information on gray whale strandings.*

4. The Draft EA shows a drastic reduction in the number of gray whale calves in the past two years, but uses data from 1995 when stating that there has been an increase in sighting of migrating calves. (Section 4.2.2) Also this drop in calf production is not addressed.

*Section 4.2.2 describes an increase in sightings of calves during the southbound migration as a function of migratory timing, not of increased calving rates. In fact, this increase in sightings continued through 1998 (Rugh et al. 1999a), which is the last year these calf counts have been reported from the NMFS census of the southbound migration. Calf counts conducted by NMFS during the northbound migration are addressed in Section 4.2.1. The latter counts are used as the index of the proportion of calves in the population.*

## **Population Estimates**

5. Why aren't abundance estimates provided for 1999 and 2000 if calf production rates are provided for these years?

*Abundance estimates of the Eastern North Pacific gray whale population are based on a census conducted by NMFS during the southbound migration from mid-December to mid-February in central California. However, the census does not occur every year, and no counts were by made NMFS during the winters of 1998/99 and 1999/2000. Calf production rates are based on counts made by a different NMFS project conducted during Phase II (the latter part) of the northbound migration, when mothers and calves are seen. This project has been conducted during each of the last 8 years.*

6. The statement in 4.2.10 of the Draft EA that “without new survey data to directly assess abundance, it is not possible to make conclusions regarding any changes in the status of this stock relative to the last assessment” is non-precautionary because it implies that there would be no changes in management based on the recent mortality events and decreased calving. The Final EA should be modified to eliminate this implication.

*As noted in the response to comment F-1, the strandings and reduced calf counts are not likely to have changed the size of the entire population to the point that an allowance for a subsistence take of five whales would have a significant effect on the remaining stock.*

7. The age of the data considered for the conclusion of the March 16-17 workshop should be noted, that this workshop occurred before an additional year of high mortality and low calf numbers, and the minority opinions at the workshop should be noted.

*The workshop sponsored by NMFS on March 16-17, 1999, concluded the 5-year review of the status of the Eastern North Pacific stock of gray whales, as per Section 4(g) of the ESA. The final report (Rugh et al. 1999) included information gathered until June 16, 1999; accordingly, it does not contain data after that date. This Final EA does include more recent stranding data. Given the available information and the classification directives given under Section 16 U.S.C. 1533(a)(1) of the ESA, the 28 workshop attendees made an overwhelming consensus that there was no reason to reverse the October 1993 opinion of the Gray Whale Monitoring Task Group that this stock of whales did not meet the criteria of an endangered or threatened species.*

8. The Final EA should include a summary of the most recent data regarding the gray whale's population dynamics, since the status review is now two years old. If the 1997/1998 survey data are the most recent data available, then the Final EA should explain why this is the case.

*NMFS did not conduct a census of the gray whale population between 1998 and 2000. A census was conducted in 2000/01, but the final analysis will not be available for several months (see Section 4.2.1. of this Final EA). NMFS does not conduct a census every year because abundance estimates made 2-3 times every five years are considered adequate to monitor this population.*

9. The Draft EA states that "the eastern North Pacific stock of gray whales has been increasing in recent years." This statement ignores the statement in Section 4.210 in which the Draft EA states that the IWC SC concluded that the high mortality and decreasing calf production in 1999-2000 "could have caused an overall decrease in the abundance of this population."

*The best available trend analysis is based on data from 1967 to 1996 (Buckland and Breiwick, In press). This shows a nearly linear increase in the abundance of this population. The IWC SC comment indicates that the high mortality and low calf sighting rates in 1999 and 2000 "could" have decreased the abundance, but this is a speculative comment. The EA must be developed on the best available evidence. A conservative approach would be to allow that the abundance is no longer increasing, or may actually have decreased to some degree in the past two years, but this is probably a function of limitations in natural resources as the whale population finds an equilibrium after approaching its carrying capacity; therefore, this kind of change would not affect a quota. (See also the response to comment F12).*

10. The Draft EA must discuss the implications of the next stock assessment not being conducted until 2002, which may not be in time for the NEPA analysis and the new IWC request.

*As noted in response to comment F-8, a census was conducted in 2000/01 and the final analysis will be available later this year.*

11. Where is the evidence of the aerial population studies that NMFS has been undertaking?

*NMFS has not been conducting abundance estimates from aerial studies; however, there were several projects in recent years involving aerial surveys of gray whales: 1) Aerial surveys were used to determine the offshore distribution of whales relative to shore-based observers conducting the gray whale census (see Section 4.2.1; Sheldon et al. in press). 2) NMFS conducted six aerial surveys off northern Washington in the winter of 1998/99 to assess migration timing and distance from shore (Section 4.2.2; Sheldon et al. 1999). 3) NMFS has been conducting aerial photogrammetric surveys of migrating gray whales since 1997. The focus of this work has been to determine whether reproductive and nutritive condition of migrating whales can be determined from analysis of measurements taken from vertical aerial photographs. Preliminary results of these efforts have been reported at Marine Mammal Conferences at Monaco and Hawaii, and a draft manuscript documenting the success of the technique is currently going through the scientific review process.*

12. Due to the large mortality rate over the recent years, the population cannot possibly be at the claimed 26,000 level.

*The 1997/98 whale counts conducted by NMFS resulted in an abundance estimate of 26,635 (95% log-normal confidence interval = 21,878 to 32,427). If the population continued to increase at the documented rate of 2.5% per annum (SE= 0.3%), then currently (2001) there would be roughly 28,000 gray whales. However, NMFS believes the eastern North Pacific population is at or near its carrying capacity. Therefore, NMFS expects the average rate of mortality to increase and the average rate of reproduction to decrease, until the population is at equilibrium. See Section 4.2.1. of the Final EA for information on recent census.*

13. The table in the EA on gray whale population indicates that the gray whale population increased from 17,674 to 26,635 in 6 years. This would represent an average population increase of 8.25% per year, while in the previous 15 years the increase was only 2.05% per year. This is an one example of how flawed these population estimates are.

*There are acknowledged variations in abundance estimates between years, but the most dramatic is the low estimate made in 1992/93 relative to the preceding and following years. The results from this season have been explained as problematic due to possible changes in the proportion of the population passing the census station, unusually poor sighting conditions, or a missing source of variation (Laake et al. 1994). Correcting for these conditions or ignoring the results from 1992/93 would elevate, not depress the overall abundance estimates and trends. Nowhere in the EA or elsewhere is there a suggestion that the abundance has increased at a rate of 8.25% from this anomalously low estimate (17,674) to the highest available estimate (26,635). Instead, the trend referred to in Section 4.2.1 is based on 16 years of data (Buckland and Breiwick, in press) not two.*

14. It seems odd that the 1997/1998 data used in the Draft EA was not even mentioned in the 1999

SAR.

*Because gray whales are not considered a strategic stock under the MMPA, the Stock Assessment Reports (SARs) are updated every three years, or as important new information becomes available. The SAR included in the 1999 NOAA Technical Memorandum was last updated in July of 1998, and thus did not include information from the 1997/1998 data. These data were, however, included in the 2000 SAR.*

## **Migration**

15. More information is provided in the Draft EA on the southward migration, which the Makah are less likely to hunt, than on the northbound migration. More information on the northbound should be included.

*Available information on the timing of the northbound migration through the Pacific Northwest is included in Section 4.2.2. of the Final EA.*

16. NMFS has not adequately addressed the problem of the timing, dates, and area of the migration. The past hunt allowed the Makah to hunt “migrating whales” even when sound science at the time indicated that those dates had no bearing on the reality of the gray whale migration.

*The gray whale hunt in 1998, 1999, and 2000, was structured with the intent of targeting migrating whales. This was accomplished by setting time and area restrictions for the hunt using the best available scientific information. Recent scientific information indicates that the expected period for the migration off Washington is the beginning of December to the beginning of June. NMFS has used the best scientific information available in preparation of this EA and in selection of the preferred alternative.*

17. The EA disregards 30 years of studies of gray whale migrations off the coast of Washington and instead uses studies from Alaska and California to “indicate” and “expect” times of migration in Washington. This is speculation and ignores long-term, peer reviewed science because it does not support NOAA’s position.

*NMFS is not aware of any 30-year study of gray whales off the coast of Washington. All available reports of systematic counts through parts or all of the southbound migration are summarized in Rugh et al. (1999b), including counts done in Washington. Very few seasonal distribution studies have been done throughout the northbound migration except in California. See response to comment F-15.*

18. According to Dr. Jim Darling the spring migration comes in two waves, with the second smaller wave in May and June consisting almost entirely of cows with calves. The proposed hunting seasons

therefore are completely flawed.

*The EA references that the second wave of the northbound migration consists primarily of cows with calves. The Management Plan requires that Makah whalers avoid striking any whale that may be accompanied by a calf. Timing of the northbound migration in Washington and British Columbia may vary from year to year in respect to the proportions of females with calves present during certain months. Observations during the Makah hunts in May of 1999 and 2000 indicate that many of the whales in the vicinity were single, large adult-sized whales without calves.*

19. Current rules prohibit killing a mother with a calf. However, in Section 4.2, the seasonal window for the fall allows for hunting on the early parts of the migration which is made up of pregnant females. The effect of the Makah take a pregnant female with a female fetus has a compound effect of future population. The window should be narrowed and if a pregnant female is taken it should count as two whales for the quota.

*Hunting during the fall period would not necessarily result in taking pregnant females since a certain proportion of the whales present would be males, subadults, or a part of the Pacific coast feeding aggregation. Even if pregnant cows were taken, the IWC does not specifically prohibit such taking, nor does it count pregnant females as two animals against any given quota.*

20. The period for the spring hunt in April through June would target migrating females with calves, or resident whales.

*Female gray whales with calves could be present in Washington during April through June, but their actual proportion relative to the general population during this time is unknown. Females with calves would be easily avoided by whalers since the calves generally stay quite close to the females and are easily visible.*

21. The EA fails to define what is a calf.

IWC regulations prohibit the take of a calf or of a female accompanied by a calf (referred to as ‘mother-calf pairs’). IWC regulations do not have a formal definition for a “calf.”

### **Potential Biological Removal (PBR)**

22. The summary in the Draft EA regarding human-caused mortalities needs to be clarified. Specifically, how did the Agency arrive at the annual average subsistence harvest of 76 gray whales? It would be more appropriate to use the figures presented in Section 4.2.4 - 122 whales in 1998 and 124

in 1999.

*The estimated annual level of human-caused mortality and serious injury of 83 gray whales is taken from the most recent stock assessment report for eastern North Pacific gray whales (Ferrero et al. 2000). This estimate is based on a 5-year average (1993-1998) of human-caused mortality and serious injury. The average human-caused mortality and serious injury of 83 gray whales includes an annual average of 6 from commercial fisheries, 76 from subsistence harvest, and 1 from ship strikes. As for the abundance estimate, Ferrerro et al. 2000 uses an average human-caused morality and serious injury from 1993-1998.*

23. The Government's discussion of the PBR for the gray whale is inaccurate and results in a PBR which, if met, would drive the gray whale to extinction. The removal contemplated in a PBR should include all forms of mortality, including human-caused mortality from entanglements in fishing gear, ship strikes, strandings, slaughter, disease, oil and gas exploration in the Arctic feeding grounds, development, harassment by boaters, and global warming or other reasons, and should account for undocumented mortality (e.g. extrapolations based on strandings).

*The estimated annual human caused mortalities are from Marine Mammal Stock Assessment documents (See Ferrero et al. 2000 for gray whale assessment) which include the best available information on sources of mortality. Human-caused mortality from entanglements in fishing gear (including those resulting in stranded animals), from subsistence harvest, and from ship strikes are included in the calculation of the PBR. There are no documented mortalities or serious injuries which have resulted from oil and gas exploration, development, harassment by boaters, or global warming. Based on the current population level and rate of increase of this population, it seems reasonable to assume that these have little, if any, negative cumulative impact on the population.*

24. We question what the implications are for management if some or all of the stranded gray whales from the last two years were the result of human activities. In this case, the gray whale deaths would be considered other than "natural mortalities," and the PBR may have been reached or exceeded for the last two years.

*There is no evidence that the increased number of stranded gray whales was caused by anything other than an increase in the natural mortality rate.*

25. The Draft EA cannot accurately set a PBR without taking into account gray whale strandings and the decrease in calving.

*Natural mortalities are taken into account in the PBR calculation.*

26. The applicability of PBR is restricted to Sections 117 and 118 of the MMPA and relates only to

the taking of marine mammals incidental to commercial fishing operations. The Agency should clarify in Section 4.2.1 of the Draft EA the applicability of the PBR concept in the MMPA and to explain why such an analysis is appropriate in this case.

*Sections 117 and 118 of the MMPA establish a long-term regime governing interactions between marine mammals and commercial fishing operations. Section 117 of the MMPA requires NMFS to prepare and periodically update marine mammal stock assessment reports. Among other information, these reports are to include a potential biological removal level or PBR. Section 118 of the MMPA requires that commercial fisheries be classified according to their level of take of marine mammals relative to PBR and that NMFS reduce mortality and serious injury in commercial fisheries below PBR.*

*The PBR framework was developed in order to comply with Sections 117 and 118. Although the PBR concept is generally limited to takes by commercial fisheries, NMFS believed that it would be useful in this EA as a means of evaluating potential effects of Makah whaling on the Pacific coast feeding aggregations. As discussed in Section 4.2.3 of this EA, the best available scientific information does not indicate that the Pacific coast feeding aggregation is a biologically distinct group of animals; however, in order to take a very conservative approach, NMFS treats the Pacific coast feeding aggregation as a separate management unit in this EA and evaluates the effects of takes using the PBR framework. This approach is consistent with that used by Quan (2000). An alternate approach would be to analyze recruitment into the feeding aggregation; but, with the recent information on the expanded range of the Pacific coast feeding aggregation from California to Alaska in areas that have not been routinely surveyed, such analysis would require assumptions on non-surveyed areas resulting in high levels of error; therefore, this approach was not used in this EA.*

27. The PBR calculation is only as good as the population estimate that is used. The population estimates used in the Draft EA are questionable and the 1997/1998 seem impossible given the 1995/1996 data. We question how this PBR would be effected if a more recent abundance estimate were substantially lower than the 1997/1998 estimate.

*See response to comment F-13.*

28. The PBR is based on a maximum theoretical net productive rate of 0.053 used in the Draft EA is more than double the current observed rate of increase. The 1999 Alaska SAR recommended that 0.04 be used as the Rmax for this stock. NMFS apparently justifies the 0.053 value with a paper by Ferrero which was in preparation at the time of completion of the Draft EA and therefore unavailable for analysis by commenters.

*The Ferrero et al. (in prep) reference refers to the draft Stock Assessment Reports, which were released for public review and comment ( Notice of Availability published May 18, 2000; 65 FR*



31520) when the Draft EA was written. The PBR level in the final SAR for gray whales used a maximum theoretical net productivity rate of 0.047, which is used in this Final EA. This value is based on an analysis by Wade (in press), that determined that  $R_{max}$  is 0.072, with a 90% probability the value is between 0.039 and 0.126. The value of 0.047 is the lower 10<sup>th</sup> percentile of this range.

29. The PBR calculation does not make sense. Why shouldn't the PBR be based on adult females since only adult females can produce young? If PBR is intended to provide a safe level of removal, it would make more sense to use the one-half of the observed rate of increase rather than the maximum theoretical rate of increase.

*A value for a marine mammal stock's PBR level is calculated, as specified in the MMPA, by the product of two population statistics (a minimum population estimate of the stock and one-half the maximum theoretical or estimated net productivity rate of the stock at small populations) and a recovery factor. The concept of PBR is based on well-founded theory in population ecology, and the concept and its implementation by NMFS is thoroughly described in the peer-reviewed literature (Wade, P. 1998. Calculating limits to the allowable human-caused mortality of cetaceans and pinnipeds. Marine Mammal Science 14:1-37).*

30. Any proposed human takes of these whales would need to occur near the end of a year after a determination is made as to whether the PBR had already been exceeded.

*PBRs are not determined based on only one year of data, but rather represent an average of takes over several years. As described in Section 4.2.1, PBR calculations (Wade and Angliss 1997) and performance simulations (Wade 1998) have been based on the concept of averaging mortality over a given time period. In many fisheries, estimates of mortality are subject to error and are often not conducted annually; these estimates are typically averaged over several years (Wade and Angliss 1997). Therefore, in assessment of impacts on the population, NMFS does not restrict its assessments of quotas to annual values. As long as the average over the three-year period is less than the PBR, the take should be considered sustainable within the framework of the PBR management strategy (Wade and Angliss 1997).*

31. Since the gray whale population is not fully recovered, the Agency should use a reduced recovery factor of .85, .90, or .95.

*Recovery factors for non-listed stocks are set between 0.5 and 1.0. NMFS chose to set the recovery factor for gray whales at the upper end of this range because the population has continued to increase while undergoing removals due to subsistence harvest (Wade and Angliss 1997). This recommendation has been supported by the Alaska Scientific Review Group.*

32. Section 4.2.6 of the Draft EA concludes that because fishery-related mortality of gray whales from

the eastern Pacific stock is likely below 10 percent of the PBR for the stock, it “can be considered significant and approaching a zero mortality and serious injury rate.” The Agency should remove this statement, as it has not yet established criteria for determining what constitutes a zero mortality and serious injury rate under the MMPA.

*This statement was taken from the 2000 Alaska Stock Assessment Reports. For clarification, the reference to zero mortality rate has been removed in the Final EA.*

### **Benthic Amphipods**

33. NEPA regulations require that “environmental information is available to the public officials and citizens before decisions are made and before actions are taken,” yet the Draft EA ignores information critical to this debate. The Draft EA provides virtually no information about the status, health, quantity, and quality of gray whale habitat and, in particular, gray whale food supplies.

*Although research has been conducted on gray whale food preferences, feeding locations, prey density, energetics, etc. (see Jones et al. 1984; Rice 1986; Rice et al. 1984; Rice and Wolman 1971), at best, these studies are sketchy approximations of what NMFS estimates are the resources available and needed by gray whales. The best evaluation is done by measuring the health of the stock. High abundance, upward growth, and high calf productivity are good indicators that the whale stock does not have serious resource limitations. On the other hand, when abundance is reduced and calf productivity drops, we may be receiving signals that the population has approached the carrying capacity of its environment (e.g. Reilly 1992; Le Boeuf et al. 2000).*

34. The EA fails to take into account current evidence indicating the collapse of the benthic amphipods in the Bering Sea. While Makah whaling will not impact the gray whales benthic food supply in the arctic, whale food supply is critical to the population health and the biological significance of whale slaughter. NMFS must disclose and evaluate is that the amphipod populations have collapsed in certain areas, that gray whale stranding and starvation rates have substantially increased while birth rates have substantially decreased and that global warming and El Nino events will continue to modify the structure, abundance, composition, and even the existence of benthic amphipods with the critical gray whale feeding ground. The failure of NMFS to include discussion of benthic amphipods in the Bering Sea is even more egregious considering that it hosted a Bering Sea Ecosystem Workshop in December 1997. The Draft Five Year Monitoring Plan for the Gray Whale recommended a study to determine the status of benthic amphipod standing stock in the summer feeding range of the Bering and Chukchi Seas. These studies have not been undertaken.

*See response to comment F-33. Although there are indications that there may be fewer benthic amphipods at some sites in Alaskan waters in recent years relative to samples taken in previous years, this has little bearing on the proposed take of several gray whales by the Makah in*

*Washington. If results from these samples are taken to mean a generalized reduction in resource options (as presented by LeBoeuf et al. 2000), then the appropriate logic would be that the current population of gray whales exceeds its current carrying capacity, i.e., there are too many whales relative to the limited resources. Comments on “the gray whales’ predilection to forage widely for suitable prey species” are made in Section 4.2.3 in the Draft EA. More research towards defining the limitations of resources of gray whales is important to better understanding the full ecological picture, but funding limitations have prevented expansions of research in this area.*

35. No quota should be issued to the Makah until these studies on benthic amphipods have taken place.

*As indicated in the responses to comments F-33 and F-34, although there are indications that there may be fewer benthic amphipods at some sites in Alaskan waters in recent years relative to samples taken in previous years, this has little bearing on the proposed take of several gray whales by the Makah in Washington.*

## **Other**

36. The 1999 Status Review of the North Pacific Gray Whale population notes that the population may be vulnerable to commercial or industrial developments. The Final EA should discuss such impacts.

*Section 4 of the EA includes a discussion of the factors effecting eastern North Pacific gray whales.*

37. Section 4.2.5 of the Draft EA gives excessive prominence to the potential impact of killer whale predation on gray whales. It serves no purpose other than to foster a negative perception of killer whales. The issue is addressed adequately in the first two sentences of this paragraph; the remainder of the paragraph should be deleted.

*The content of the second paragraph in Section 4.2.5 is to express that killer whales have been a persistent and important presence in the evolution of gray whales (as described in Corkeron and Connor 1999).*

38. NMFS rushed publication of the Draft EA enabled it to ignore the most current data on the gray whale population, specifically the results of the November 2000 scientific workshop in Santa Cruz, CA. The results of the November 2000 scientific workshop in Santa Cruz should be included in the Final EA.

*Currently, no published report is available from the workshop held in November 2000, therefore, conclusions drawn from this meeting could not be incorporated in the Draft EA. Also, this workshop was designed as a modeling exercise with the primary intent to identify areas needing more research; thus, the workshop topics are not directly applicable to the EA.*

39. A five-year plan to monitor the status of a stock after delisting is required under Section 4(g) of the ESA, yet the Makah were given permission to hunt before this monitoring was complete.

*The required monitoring period was for the five years following the official delisting on June 16, 1994 (59 FR 31094). Accordingly, the status review summarized in Rugh et al. (1999a), which includes information through June 16, 1999, concludes this monitoring period. The rights of the Makah to have a subsistence take can still be accommodated during this monitoring period..*

40. It is stated in Section 4.2.9 that at the 52<sup>nd</sup> IWC meeting the results of “a study” reported that a salt facility in the San Ignacio lagoon would pose no threat to the gray whales who breed and calve there. Section 4.2.9 should describe the reaction of the IWC or its Scientific Committee to the Urban report and should indicate that there was considerable opposition to the project by several groups based on its potential impacts to gray whales.

*As discussed in the Draft EA, the proposed development of a salt facility in the San Ignacio lagoon was abandoned; therefore, NMFS determined that it was unnecessary to include further discussion of this issue in the Final EA.*

41. Since gray whales are a trans migratory species, the U.S. Government should consult with the governments of Mexico or Canada?

*The U.S. Government is not required to consult with the governments of Mexico or Canada on this action, which is in accordance with U.S. law and relevant international laws.*

42. The Draft EA should state in 3.1 the actual Makah hunting practices as they relate to impacts on whales. Impacts to physical, psychological, and emotional effects to the whales from the pursuit, wounding and killing of individual whales, whales in the same pod, or in the audible vicinity has not been evaluated.

*Section 5.3 of the Final EA includes a discussion of potential impacts of the hunt on gray whales, including potential impacts of pursuit and attempted strikes of gray whales.*

43. Under Section 5.3, the Draft EA states that “there would be no effects on the gray whale population as described in Alternative 1.” The Final EA should reword to clarify that the effects on the gray whale population are insignificant, but not state that there would be no effects at all.

*The Final EA has been revised to indicate that the proposed action is not expected to have a detectable effect on the size or status of the eastern North Pacific gray whale population. Section 5.3 of the Final EA discusses the potential impacts of the proposed action on individual whales. These potential impacts are minimal.*

44. Numerous researchers have noted the importance of deceased whales in local marine food chains. NOAA should determine the importance of these deceased whales from resident gray whale populations on the ecosystem of the waters of Washington State before concluding there will be little impact from Makah whaling.

*A dead whale can have a significant impact on a local environment, but this kind of impact—whether positive or negative—is sporadic, random, and very localized. The human consumption of a whale will mean there is the absence of this impact in some location where the whale may have otherwise died. It does not mean that there is a predictable change to an extant environmental condition.*

45. What is the effect of the Russians’ excessive take of mature females and young whales on the future progeneration capacity of the gray whale population?

*The Russian take of gray whales from the eastern North Pacific stock has been estimated to slow the potential recovery from 3.4% to 2.5% (Section 4.2.1). There has been a long history of whaling from the eastern North Pacific stock of gray whales (see Section 4.2.4), yet despite these takes, the population has recovered.*

46. Based on sound biological and population dynamics information on the gray whale population provided in the Draft EA, an allocation of up to five gray whale per year for the Makah ceremonial and subsistence needs is reasonable. The information in the Draft EA supports Alternatives 1, 2, and 3.

*NMFS has identified Alternative 1 in the Final EA (which is a refined version of Alternative 2 from the Draft EA) as the preferred alternative.*

47. The summary in Section 2.5.4 of the review by the Gray Whale Monitoring Task Group is incomplete. The Final EA should note that the Group also stated the following: “There was a consensus among the workshop participants that the eastern North Pacific stock of gray whales should be monitored for an additional 5-year period (1999-2004), especially as this stock may be approaching its carrying capacity.” The review recommended that monitoring should include examination of environmental parameters, including the effects of climate warming.

*The commenter is correct that the report of the task force also made this statement. NMFS has not added this quote to the Final EA, as it deemed the existing text to be adequate and did not believe that this statement added to the content of the Final EA. The full report of the Gray*

*Whale Monitoring Task Group can be viewed at  
<http://www.noaa.gov/CetaceanAssessment/cetacean.htm>*

## Section G - Pacific Coast Feeding Aggregation (PCFA)

1. Why did NOAA change the nomenclature for “summer resident” whales to “Pacific coast feeding aggregation” when the prior term has been used in scientific papers for over 30 years?

*As explained in Section 4.2.3 of the EA, Pike (1962) first used the term “summer residents,” to describe gray whales that occurred off British Columbia during June through September. However, photo-identification studies show that these whales 1) move widely within and between areas on the Pacific coast to feed in the summer and fall, 2) are not always observed in the same area each year, and 3) may have several year gaps between resightings in studied areas (Calambokidis and Quan 1999, Quan 2000), so the term “summer resident” or “seasonal resident” is a misnomer. As a result, this EA uses the term “Pacific coast feeding aggregation” to distinguish these gray whales from those that feed in the northern and western Bering Sea/adjacent waters of the Arctic Ocean.*

2. The Draft EA places emphasis on the fact that gray whales from the PCFA spend most of the year in the vicinity of the Olympic Peninsula can range from California to southern Alaska. An expanded range of the PCFA animals in no way diminishes their role in the local ecosystem or their need for protection.

*The EA appropriately summarizes the results of new photo-identification studies that show that whales from the Pacific Coast feeding aggregation move between areas on the Pacific coast to feed in the summer and fall.*

3. Gray whales that remain along the Pacific coast of the United States and Canada during the summer should not be lumped together as the “Pacific Coast Feeding Aggregation.” From a management perspective, these “aggregations” should be approached as separate units in order to be precautionary.

*NMFS has taken a very conservative approach in this EA in applying the PBR concept to the Pacific Coast feeding aggregation, despite the lack of scientific information to indicate the Pacific coast feeding aggregation should be treated as a separate stock. NMFS has received no information indicating that it would be appropriate to further separate these gray whales into smaller management units.*

4. The PCFA should be treated as a separate stock or subgroup. The precautionary approach is the generally accepted management practice until demonstrated otherwise. This would be more consistent with our understanding of the populations structure and more consistent with the conclusions of the IWC’s Scientific Committee. It is important to take the precautionary approach with this group of animals which is likely in the process of evolving genetic distinctions.

*As indicated in the Draft EA, both NMFS and the IWC currently consider the eastern North*

*Pacific gray whale population to be a single stock; to date, there has been no evidence to suggest that the Pacific coast feeding aggregation should be treated as a separate stock. NMFS is taking a very conservative approach in this EA, however, by treating the Pacific coast feeding aggregation as a separate management unit for the purposes of evaluating the potential impacts using the PBR framework.*

5. It is possible that there appear to be more resident whales because additional surveys have identified new summer resident whales in different areas along the west coast of United States and Canada.

*NMFS agrees that with each additional photo-identification study, more whales will be added to the catalog, increasing the probability of finding matches. In addition, as whales revisit this area from time to time, the probability of being identified again goes up. Therefore, the list of whales identified as a part of the PCFA will rise through time.*

6. It is obvious from the data collected by Cascadia research that there are whales that return to this area year after year and remain to feed.

*As indicated in section 4.2.3, citing Calambokidis et al. (1994), there are many resightings of gray whales in western Washington waters from year to year. However, these animals are not necessarily restricted to specific areas and they do often move between areas (see answer to #9 below, regarding site fidelity).*

7. Section 4.2.3 page 20 needs to be made clear that the 216 whales and the low proportion (36%) known from previous years includes the 45 early season whales (May) discussed later in the paragraph.

*NMFS has revised this text in response to this comment.*

8. In section 4.2.3 the evidence for site fidelity is overstated. Site fidelity still exists, but on a broader geographic scale than discussed here, and would be defined as high when evaluated on this broader scale.

*NMFS appreciates this concern about overstating “site fidelity;” however, it may be noted that the only statements indicating real site fidelity were the gray whales visiting Puget Sound near Whidbey Island and Everett, Washington, from March to May (section 4.2.2). Instead, the more generalized comments (in section 4.2.3) are “overall site fidelity may have been low,” and “site fidelity does not appear to be strong in the Pacific coast feeding aggregation and repeat occurrences of whales at certain sites appears to be more related to availability of food (Darling 1998).”*

9. The proposed harvest levels, which are within the range of 2.08 to 6.78, could exceed the PCFA’s PBR if the true PBR is closer to the low end of the range. Thus, the use of these numbers to establish a



range for harvesting is inappropriate if it is intended to imply that a harvest level anywhere within the range is necessarily safe and conservative.

*As discussed in the Draft EA, the range for the PBR was based on the various parameters that could be used to calculate the PBR. The proposed action would allow a harvest that is at the low-end of the PBR.*

10. The low end of the PBR-range calculated for the seasonal resident whales is less than half the maximum number of whales proposed to be killed in any one year of the Makah hunt. The Final EA must include a discussion of the implications of this potential over-harvest of seasonal resident whales.

*As outlined in the Management Plan (Appendix 10.3) , the Tribe will limit the hunt to a total of five strikes on gray whales from the Pacific coast feeding aggregation over the two years.*

11. Section 5.2 does not discuss the fact that human-related mortality could contribute to exceeding the PCFA's PBR.

*Since the incidence of human-related mortality among possible PCFA gray whales is extremely rare, NMFS did not consider this in the calculation of the PBR. Since the proposed action limits the level of take to the low end of the PBR-range, NMFS believes that it is very unlikely that human-related mortalities would result in exceeding the PBR. Should there be a possibility of exceeding the PBR due to an unexpected incidence of human-related mortality, NMFS would reassess this issue.*

12. The population estimate of 157 is for the entire summer resident population, so any PBR number calculated using that number is not applicable to the summer resident whales in or near the Makah hunting area.

*The term "Pacific coast feeding aggregation" is used in this EA to distinguish these gray whales from those that feed in the northern and western Bering Sea/adjacent waters of the Arctic Ocean. The Pacific coast feeding aggregation includes gray whales in or near the Makah's Usual and Accustomed hunting grounds; thus, the abundance estimate and PBR for this aggregation are applicable to whales in this area. See response to comment G-3.*

13. The Draft EA neglects to state that the impacts of a hunt on the seasonal residents depend on "the recruitment mechanism that maintains the group" (Quan 2000).

*There is no evidence that gray whales found in Washington waters form a cohesive group maintained only through internal recruitment, i.e., matings and birthings entirely within a local "population." Instead, the available evidence indicates that these whales explore feeding options over a large area, from southern Alaska to northern California. Recruitment occurs as*

*other whales arrive in the area.*

14. The PBR for the resident whales cannot be determined because their population is not known.

*As described in the Draft EA, a PBR was calculated based on the best available estimates of the size of the Pacific coast feeding aggregation. The best available scientific information indicates that this aggregation is not a biologically distinct group of animals.*

15. Alternative three is unacceptable as the EA acknowledges that this alternative would exceed the PBR for resident whales.

*NMFS agrees that Alternative 3 may result in takes that would exceed the PBR for the summer feeding aggregation.*

16. The EA needs to be clearer on the timing of the hunts, since despite targeting migrating whales the 1999 hunt occurred when PCFA whales are known to be present.

*See Section 3.1 of the Final EA.*

17. There is no mention in the EA of assessing whether whales taken are part of the PCFA. Whales that are taken should be photographed and compared with the catalog of known PCFA whales.

*NMFS agrees that photographing these whales would be useful as a documentation technique; however, because of safety issues with a hunted whale, it may not be feasible for NMFS to take pictures of these animals for photo-identification purposes.*

18. Killing one or two resident whales may or may not affect their behavior, but it seems safe to assume that it would be unlikely to encourage resident behavior.

*See Section 5.3 for a discussion of potential impacts on individual whales.*

19. Whichever alternative is selected, NMFS should continue to research and monitor the gray whale PCFA.

*NMFS agrees and is continuing to conduct research on the eastern North Pacific gray whale population and, specifically, on the Pacific coast feeding aggregation.*

20. The Draft EA fails to disclose information about the scale and efforts associated with the various surveys conducted for summer residents.

*The EA includes discussion of the most recent research on eastern north Pacific gray whales, including the gray whales from the Pacific coast feeding aggregation. Additional details are available in the 2000 Alaska Stock Assessment Reports (Ferrero et. al, 2000) and in the references cited in the EA.*

21. The statement that the resident whales near Everett, WA remain only for the early part of the feeding season is false. As a naturalist on a whale watch vessel for Everett, in the 2000 season I saw the same group of five whales throughout the entire summer until August.

*NMFS appreciates receiving this information. It should be noted, however, that the 2000 season may be considered anomalous in the way gray whales were distributed. The available evidence is that in most seasons gray whales return to this area near Everett for only part of the season, particularly from March to May (section 4.2.2; see Calambokidis and Quan 1999).*

22. Allowing the Makah to hunt summer resident whales is opposed by scientific study and public opinion.

*NMFS recognizes that many constituents oppose the hunting of whales from the summer feeding aggregation. As outlined in the EA, NMFS has a trust responsibility toward the Tribe and believes that there is not a conservation need to limit the hunt to migrating whales. NMFS believes that the proposed action will ensure that there is no significant adverse impacts on the Pacific coast feeding aggregation.*

23. The bottom of page 21 should be corrected to indicate that it is hard to distinguish between PCFA animals and migrants late in the northbound or early in the southbound migrations.

*The text has been clarified.*

## Section H - Other Wildlife

1. The use of U.S. Coast Guard helicopters to patrol at low altitudes over Lake Ozette has a direct effect on the waterfowl and seabirds that occupy the lake surface. These include changes in flight and feeding patterns, especially in predatory birds such as the Bald Eagle which is an endangered species. For this reason the paragraph in Section 5.1, page 42, about secondary effects needs to be reevaluated.

*That section of the Draft EA contains an analysis of the 2,000 foot ceiling and the impacts of disturbance on these birds, which is considered minimal.*

2. The conclusion on page 43 that there would be no affect on endangered salmonids in the area has limited basis. According to a Olympic Coast National Marine Sanctuary representative, no studies have been made in the sanctuary waters on the Lake Ozette sockeye.

*Olympic Coast National Marine Sanctuary staff have not been involved in analyzing impacts to Lake Ozette sockeye to date, however, they concur with NMFS that there is no reason to believe that Makah whaling activity will affect endangered salmonids.*

3. It would seem reasonable to assume that there would be an impact on the marbled murrelet occupying the coastal strip between the OCNMS and Lake Ozette.

*No impacts on the marbled murrelet can be reasonably anticipated. The only activity that could potentially affect these birds are secondary effects associated with aerial disturbance, however the restrictions on flying 2000 feet eliminate any potential impact. See Section 5.4. of the Final EA for an analysis of potential impacts on ESA-listed birds in the area.*

## Section I - Safety

1. Section 4.1.4. of the Draft EA did not adequately describe the outcome of the implementation of the MEZ and should discuss the potential of injury to protesters. Clearly, the MEZ has the potential to increase safety concerns rather than to minimize them.

*As discussed in Section 4.1.4. of the Draft EA, the Coast Guard has established the Regulated Navigation Area and Moving Exclusionary Zone (MEZ) to address public safety and to provide the Coast Guard enforcement authority to keep non-whaling vessels at least 500 yards away from the whaling activity. The Coast Guard issued proposed and final regulations implementing this RNA and MEZ and evaluated safety issues at that time. As noted in the Final EA, there have been many violations of the MEZ, some of which have resulted in injury to the violators.*

2. The jet-skier run down by the Coast Guard boat entered the MEZ after the Makah Tribe failed to make the requisite announcement over the marine radio as required in (33 CFR 165), but the Coast Guard later stated that the radio announcement was no longer required for the MEZ to be in effect.

*The Coast Guard regulations are summarized in Section 4.1 of the Final EA.*

3. The actions of the Coast Guard were violations of the Inter-Governmental Maritime Organisation (IMO) International Regulations for Preventing Collisions at Sea (1977).

*The U.S. Coast Guard has acted within its authority in establishing and enforcing the RNA and MEZ for Makah whaling.*

5. The Coast Guard's RNA cannot contain a wounded whale and poses a safety risk to recreational users.

*The possible safety risks associated with a wounded whale are included in Section 5.7 of the Final EA.*

6. A large portion of Clallum County will oppose the potential extension of the Coast Guard RNA to the eastern extent of the Makah Tribe's Usual and Accustomed grounds.

*NOAA does not anticipate that the RNA will be extended at this time. NOAA understands that many citizens would oppose the extension of the Coast Guard RNA. Should the Coast Guard propose the extension of this RNA, it would do so through a rulemaking process.*

7. No whale watching or other boaters may venture into the marine sanctuary without risk of violating the RNA which moves at random depending upon the Makah. This is a violation of freedom of

assembly and public use of a marine sanctuary. In addition, the Coast Guard's RNA violates NEPA and other statutes.

*Challenges to the RNA were rejected in Progressive Animal Welfare Society v. Slater. The RNA rule does not constrain public use of the marine sanctuary, except in close proximity to actual whaling operations.*

8. In Alternative 4, the Coast Guard should not be left in a "difficult position" during a non-sanctioned hunt.

*Given that the proposed action would allow a hunt by the Makah Indian Tribe, this situation will not occur. NMFS cannot speculate as to what actions any federal agencies would take under the unlikely event of a non-sanctioned hunt; however, NMFS believes that the Coast Guard would seek to ensure public safety.*

9. The safety issues associated with the .50 caliber rifle are glossed over in the Draft EA by stating that the rifle will be fired downward. Expert opinion shows that the surface danger zone for the .50 caliber rifle extends to 6100 meters and that a ricochet can travel almost 1700 meters. This presents a grave safety concern and is the liability of the U.S. Government to provide protection for the thousands of citizens on the water and on the land. There are developed areas in range of the .50 caliber weapon, and the Straits of Juan de Fuca is one of the most heavily used waterways in the world. The 500-yard radius around the canoe is not sufficient to ensure the safety of vessels and individual boaters. An EIS should be prepared to address the very serious issue of public safety regarding the use of a high-powered rifle.

*The Makah Tribe's recent changes to its Management Plan address public safety concerns surrounding the hunt. The Revised Plan is included in Appendix 10.3, and Section 5.7 of the Final EA which includes a discussion of the potential effects of the proposed action on public safety.*

10. A possible scenario under Alternative 3 would be increased protests due to the targeting of seasonal resident whales, thus presenting a greater safety risk.

*Section 5.3 of the Draft EA discussed the possible consequences of Alternative 3 and specifically mentioned the possibility that this alternative could result in increased protest activity and that the Coast Guard might face greater challenges in enforcing the RNA because of easier public access to the areas where the hunt would be occurring. See response to comment I-9 for a discussion of safety concerns.*

11. General aviation in the airspace above the hunt, made up of media and general interest observers flying in a tight circular formation, causes an exponential increase in accident potential. Also since these

flight are taking place over the Olympic Coast National Marine Sanctuary and the Olympic National Park, the potential for such an accident could directly affect these environments.

*During the 1999 and 2000 hunts, NMFS did not perceive a significant safety risk to aircraft in the area surrounding the hunt. Aircraft in this airspace are required to follow all relevant regulations and to take necessary safety precautions.*

12 The Draft EA did not analyze the effects of the drain on law enforcement and emergency services during the hunts, which may limit access to these services, thus posing a safety risk, for other residents in perimeter areas.

*The analysis of the effects of the use of law enforcement and emergency services during Makah whaling activities, as opposed to alternative uses, is beyond the scope of this EA.*

13. Since the press boat is not always at the hunt, the RNA creates long periods of time when the hunt is not documented.

*A press boat is permitted in the MEZ at all times.*

## **J. Socio-economic Effects**

1. The Draft EA states that “it is unlikely that whaling activity would reduce public participation, in fact it may increase it as it raises public awareness of whales”. Many whale watchers are terrified that they may see a whale being hunted. Section 4.6 does not discuss the possibility that potential whale watchers would consider it adverse to patronize businesses in an area where whales are known to be hunted.

*The sentence referred to has been deleted. There is no information to demonstrate that Makah whaling activity will reduce public participation and none of the commercial whale watching operators in Washington provided comments on the Draft EA that substantiated concerns that whale watching may be affected by Makah whaling. The remainder of the issues raised in this comment are addressed in Section 5.11, Effects on Whale Watching.*

2. Many of the statements in the section on the effects on whale behavior and the whale watching industry are simply conjecture and speculation. NMFS failed to research and present considerations of the industry.

*It is unlikely that the Makah hunt, which is limited to seven strikes annually, will change the behavior of gray whales, making them more wary of boats or less approachable. While the behavior of individual whales (see Section 5.3, Effects on Individual Whales) near boats might be affected if they are wounded but not killed by Makah hunting, it is unlikely that this will change the behavior of other gray whales. See Section 5.11 for a full analysis of this issue.*

3. The EA ignores the fact that the resident whales form the basis of many whale watching operations in Washington. Unless NMFS plans to place a member of Cascadia research on the whaling vessel to identify each resident whale, this is an unacceptable infringement on the business.

*The EA considers the impacts on the Pacific coast feeding aggregation. NOAA does not agree that these whales form the basis of many whale watching operations in Washington. See Sections 4.6 and 5.11.*

4. Many operators have reported a significant decrease in business since the Makah began their hunt.

*As stated previously, there is no evidence of any impact on the whale watching industry, and NMFS did not receive any comments or information from commercial whale watching operators in Washington that substantiated concerns that whale watching may be affected by Makah whaling.*



5. The finding that “Makah whaling is unlikely to affect whale watchers” is limited to Alternative 1 and is not evaluated under the terms of Alternative 2. This is ironic considering that the potential for impact on whale watchers is much greater in Alternatives 2 and 3 that would allow whaling in inner waters during the summer.

*Section 5.11 evaluates the effects on whale watching for all of the alternatives in the Final EA including the preferred alternative, which allows for limited whaling during the summer months.*

6. There are many whale watching excursions during the summer months in the areas being considered for the Makah hunt. This will destroy their livelihoods and may place them and their customers in danger.

*Section 4.6 describes the whale watching industry in Washington. As stated in that section, few whale watching trips occur in northern coastal Washington and the western Strait of Juan de Fuca. There is no information to suggest that the Makah hunt will have a negative impact on the whale watching industry. See section 5.7 regarding potential impacts on public safety.*

7. It is untrue that, as the Draft EA states, there are no regularly scheduled whale watching operations off the northern coast of Washington. NMFS should properly research this segment of the whale-watching industry.

*There is no information available, nor was any submitted in the public comment period, about regularly scheduled whale watching trips in northern coastal Washington.*

8. The Draft EA does not discuss the decline of Orca whales and the economic opportunities offered by the resident whales to the whale watching industry due to Orca declines.

*As NMFS has stated, the limited hunt by the Tribe will have a negligible effect on the numbers of gray whales present to be viewed. Therefore, the hunt will not have an impact on any possible shift in favored species by the whale watching industry.*

9. The statement in the Draft EA that the Makah hunt is unlikely to change the behavior of gray whales is mere opinion. The hunt will result in changes in gray whale behavior which will result in monetary for the whale watching industry.

*The potential impacts to individual gray whales are discussed in Section 5.3; however, based on the available scientific information, there is no reason to believe that the proposed action will impact gray whale behavior. The effects on whale watching are discussed in Section 5.11.*

10. The statement in 4.2.7 “Conversely, some whales swim towards small skiffs deployed from whale

watching boats in breeding lagoons, seemingly attracted by the noise of idling outboard engines.” is false. Whales often approach rowboats and boats with their engines shut off, often to seek human contact.

*This purpose of this statement, now in Section 4.2.10, is to illustrate that whales both avoid and are attracted by noise. Whales may also approach boats whose engines are turned off.*

11. The Draft EA includes very limited discussion of the possibility of the Makah Tribe developing whale watching and ecotourism in lieu of whaling. The Draft EA should discuss within Alternative 4 what resources or funds the U.S. Government would pledge should the tribe offer to not whale. The fact that the Makah have objections to whale watching instead of hunting is irrelevant.

*Both the draft and Final EAs discuss the potential for ecotourism by the Tribe. As stated in Section 5.6, the Tribe informed NOAA that it did not consider whale watching or ecotourism an acceptable alternative to exercising its treaty right to hunt whales. The position of the Tribe on this matter is relevant because of the Tribe’s rights under the Treaty of Neah Bay.*

12. Section 4.6 of the Draft EA states that “In Neah Bay, several attempts have been made in past years to establish scheduled whale watching excursions on salmon and halibut charter vessels during the spring gray whale migration, but they were not successful.” If any reasonable attempts have been made in recent years, then major non-governmental organizations are unaware of them. A whale watch from Neah Bay was coordinated in June 1997 with the participation of several Makah tribal members. The event was highly successful, including the sightings of many whales, sea otters, and marine birds.

*Section 4.6 describes the whale watching industry. Whale watching in Neah Bay is limited to arrangement with charterboat operators. See Section 5.6 for the Tribe’s position on whale watching.*

13. The EA leaves out the fact that many individuals with years of whale watching experience offered to assist the tribe in establishing a whale watching industry in exchange for an agreement to culminate their whaling plans. These efforts were met with limited effort and interest by the Makah.

*As stated in Section 5.6, the Tribe informed NOAA that it did not consider whale watching or ecotourism an acceptable alternative to exercising its treaty right to hunt whales. Considering the Tribe’s position regarding whale watching, a discussion of what efforts were made to assist the Tribe in establishing whale watching are not necessary.*

14. Contrary to the statement in the Draft EA, Neah Bay does not have “unpredictable sighting conditions.” Seasonal residents are present throughout the spring and summer and weather and sea conditions are far better than in Westport where whale watching occurs daily in the spring. It is more accurate to state that whale watching has not become established in Neah Bay because efforts and

funding for such an initiative have been limited.

*According to NMFS scientists who frequently work near Neah Bay, whale sightings are highly unpredictable. Over the last several years in particular, sightings in the western straits and northern Washington have been infrequent.*

15. Section 4.6 of the Draft EA states: “Some operators advertise trips from the ports of Nahcotta and Seiku/Neah Bay.” Neah Bay and Seiku are approximately 20 miles apart and the Final EA should make clear the distinction between these two communities.

*Section 4.6 of the Final EA has been revised in response to this comment.*

16. The fragile economy of the area has been damaged by the whaling controversy. An assessment of the impact on the tourist industry, which showed a sharp decline during the summer of 1999, needs to be included in the EA to evaluate how this issue is affecting the economy. These effects of the whale hunt were documented in the local press in the form of steeply declining sport fishing charter statistics and flat or declining resort bookings, despite one of the best salmon runs in history. Outraged citizens canceled reservations and presumably took their tourist dollars elsewhere after the Makah were allowed to kill a whale. Selection of Alternative 3 could result in further boycotts in the State of Washington.

*Section 5.9 analyzes the effects on the general public, including an analysis of the tourist industry. This analysis shows no adverse impacts from Makah whaling.*

17. The Draft EA does not even begin to address the impact of the Makah whale hunt on the people of Clallum County, the economy of the area, nor does it address the shocking impact it has had on the lifestyle of the citizens of Washington state.

*Section 5.9 addresses the effects on the general public, specifically in Clallum County. NOAA recognizes that many individuals and groups are strongly opposed to the hunt, and further recognizes that this issue evokes strong feelings of emotion among these people and groups. NOAA believes that these potential impacts do not constitute a significant impact under the NEPA definition.*

18. The Draft EA contains no assessment of the taxpayer cost to conduct the whaling. BIA, NMFS, Coast Guard, State of Washington, National Guard, local law enforcement all spend taxpayer dollars to ensure the Makah are allowed to whale. This cost, reported in newspapers to be \$4.7 million, needs to be included. In addition, the impacts of diverting these funds for Makah whaling was not addressed in the EA.

*The U.S. Government has provided assistance to the Makah Tribe to ensure compliance with*

*international and domestic laws, monitoring, and coordination with NMFS. Funds have supported research on the most humane methods possible for killing gray whales, documentation of nutritional needs that would be met with whale meat from the harvest, and attendance by Makah members at the IWC annual meetings. Funds have helped ensure monitoring and reporting to NOAA and the IWC on the hunt, including the humaneness of the hunt and the utilization of whale meat and products.*

*NMFS does not have specific information on the level of resources that have been dedicated to Makah whaling. The indirect impacts of dedicating these resources to Makah whaling rather than other uses is beyond the scope of this EA.*

19. The EA should specifically state whether the Makah Whaling Commissioner was paid \$24 per hour and if the crew was paid for training, paddling, meetings, or whaling in 1996-2000. *NOAA regulations and the Makah management plan stipulate that no person may receive money for participating in whaling. The Tribe has given assurances that it will not make payments to the crew for whaling or associated activities in the future.*

20. Killing resident whales would deprive residents/visitors of the pleasure of seeing them.

*The impact of this limited hunt on the population of gray whales will not deprive residents/visitors of the pleasure of seeing them, as the effects on the population of gray whales will be negligible.*

## Section K - Contaminants -

1. The United States has an obligation, by law, to provide information concerning human risk factors associated with ingesting pollutant bearing fish or wildlife. No warning of the pollutants and the attendant dangers to human health of eating whale flesh have been issued to the Makah. These whales are likely high in PCBs and DDT. This is a legal breach of obligation.

*Information about chemical contaminants found in gray whales is detailed in Section 4.2.8. While some contaminants are present in the blubber, meat, and organs of the whales in these studies, the overall contaminant load in the gray whales studied is low compared to Odontocetes (toothed marine mammals) and is comparable to other baleen whales. PCB and DDT levels are below FDA regulatory tolerance limits for human consumption based on fish and shellfish guidelines. Since NOAA is not a public health agency, it has routinely provided marine mammal contaminant data to human health organizations; NOAA has also provided contaminants information directly to the Makah Tribe.*

2. NOAA is responsible for encouraging the Makah to consume cetacean flesh that is likely polluted with a variety of environmental toxins, which are particularly harmful to infants and small children. At a minimum, pregnant women should be advised to avoid eating any whale meat and others warned to limit their intake.

*NOAA is not encouraging anyone to consume whale meat. It is true that the developing fetus and breast fed infant are likely to be more sensitive to the effects of organochlorines and other contaminants than adults (Jensen et al. 1997). The level of contaminants in this stock of gray whales is comparatively low, as stated previously.*

3. The Draft EA explains that NMFS acknowledges the potential danger to tribal members' health from pollutants and then dismisses this concern: "nonetheless the Tribe is aware of the risks, and information on pollutants has been made available to the Tribe for its use in assessing risks to tribal members." NMFS does not cite any authority for dismissing a public health risk because a potential target population is supposedly aware of the risks. The Indian Health Service of the U.S Dept of Health and Human services has not provided the proper warnings and evaluations. No monitoring program is proposed to check on the tribal people who eat marine mammals.

*See responses to comments K-1 and K-2.*

4. There are also many other contaminants found in whales others than those mentioned which pose a risk to humans such as chlordane, hexachlorocyclohexanes, dimethylmercury, cadmium and mercury. The Government should address these contaminants as well.

*Additional information has been added to the text on other contaminants. For more information on contaminants in gray whales see references Krahn et al. (2001) and Tilbury et al. (In preparation). For more information on health risks, see reference Jensen et al. (1997) or talk to a public health agency.*

5. Because of the developing nature of a child's immune system they are particularly susceptible to adverse consequences associated with consumption of contaminated whale meat.

*See response to comment K-2.*

6. The Draft EA must include the FDA regulatory tolerance limits for human consumption, in terms of gray whale products, the ADI in weight by tissue type, and if these contaminants are a concern if consumed on a regular basis. (12, 29,34). The Final EA should disclose what the tolerance limits are and how tolerance limits in fish and shellfish can be extrapolated to whales.

*As noted in the response to comment K-4, NMFS has included additional information on other contaminants that potentially pose a risk to humans. FAO/WHO, FDA, and Canadian Health and Welfare regulatory limits for contaminants in seafood are summarized in reference Ahmed (1991) and Canadian ADI guidelines are available in reference Jensen et al. (1997).*

7. The EA produces no results of the biopsy samples from gray whales off Washington. NMFS must provide an analysis of this issue.

*Most of the results discussed in 4.2.8 are from gray whale biopsies taken off the coast of Washington. For the entire text see Krahn et al. (2001).*

8. In Section 4.2.8 the EA fails to mention whether the concentrations are based on lipid or net weight. This is especially critical to know related to comparison of different tissue types.

*The weights in Section 4.2.8 are now all given in wet weight.*

9. The Agency should examine whether the effects of handling, the time after death that a sample was collected, and storage methods may have contributed to the marked differences in measured lipid levels of blubber collected from gray whales in different settings.

*The data provided in Section 4.2.8 are from peer reviewed journals using the best possible techniques available. See the journal articles for exact details of the methods used.*

10. The Final EA should include a discussion of the gray whales taken in the Russian hunt that smelled like medical waste and were unfit for human consumption.

*The scientific committee of the IWC was made aware of this issue at the IWC meeting held in Adelaide Australia in June 2000. Unfortunately there were no appropriate tissues taken for examination from these whales. NOAA has funded a project through the North Slope Borough to work with native communities to collect samples for analyses to address this issue and the issue of further health comparisons with stranded whales. A report on the results of this project is scheduled to be issued in 2002.*

11. The Draft EA fails to describe the extent of toxins in the gray whale's habitat; fails to identify sources for toxic contaminants; avoids discussion of the likelihood of gray whales being exposed to contaminants or why, given their behavior, they are not highly contaminated.

*Section 4.2.8 discusses feeding behavior of gray whales and their exposure to contaminants. For a detailed analysis, see reference Krahn et al. (2001), Tilbury et al. (2001) or Ylitalo et al. (1999).*

## Section L- Humane killing & 1999 Hunt

1. The description of the May 1999 take of a gray whale by the Makah is incomplete and should include details regarding the location where the whale was killed and details regarding the landing and butchering of the whale.

*The gray whale that was killed on May 17<sup>th</sup> was struck with a harpoon at 48° 13' N, 124° 43' W. The report of the 1999 hunt provided in the draft and Final EAs provided all other critical details regarding the hunt.*

2. It is concerning that the Draft EA describes a physical contact strike of a harpoon on a gray whale during the spring 2000 hunt, but this strike is not counted as an official “strike.”

*In the attempted strike at 11:19 PDT on May 15, 1999, the harpoon did not attach. It was not considered a “strike,” nor would it be considered a strike under the revised definition.*

3. The EA states that the whales targeted were in deep water. The fact, supported by radar, was that the canoe was so close to shore that people on land would have been in the MEZ, were in 30 to 60 feet of water, and within a bay.

*NMFS assumes this comment is in reference to the hunts conducted by the Makah in 2000. According to NMFS observers the large majority of the time during the 2000 hunt was spent in locations where the water was greater than 50 feet deep and to the west of Father and Son Rock, staying approximately one-half mile or greater from shore. It is possible that by cutting between Father and Son Rock and the shore that the MEZ could extend to the shore, but since the MEZ applies to vessels this is not relevant. In addition, northbound migrating whales travel very near shore so deep water in this case is a relative term.*

4. The EA states that the whales targeted during the Makah hunt were not feeding, however media video footage clearly shows the mud plumes associated with feeding.

*NMFS biologists on-site during the hunt did not witness any mud plumes, but since these are normally spotted from aircraft they would not be expected to. It is possible they existed however, since it is well documented in scientific literature that migrating whales, particularly northbound whales, conduct exploratory feeding during migration. Whereas whales feeding during the summer would be expected in very shallow water feeding near kelp on mysid shrimp and have short dive times, migrating whales may conduct exploratory benthic feeding with longer dive times.*

5. The Draft EA stated that the Makah must be hunting migrating whales because they stayed under



water longer; not said is that they stayed under water because they were being hunted.

*The Draft EA indicated that the whales in the area appeared to be migrating whales because the average dive time was eight minutes. This behavior is consistent with that of migrating whales. NOAA does not believe that the whales were diving for longer periods of time because of the presence of the whaling canoe.*

6. Review the length of time to death, it appears closer to nine minutes than eight.

*The time to death, as determined and recorded by NMFS biologists onsite, was eight minutes.*

7. Section 4.2.2 of the Draft EA states that later migrations are females with calves, and the whale killed in 1999 was a female calf.

*As described in the draft and Final EAs, the later migrations comprise predominantly female gray whales with calves. The whale killed in 1999 was not a calf; it was a non-lactating female gray whale that measured 30 feet 5 inches.*

8. The EA states that the age of the whale taken could not be determined. Given that ear “plugs” of whales give very accurate age estimates, why could the whale’s age not be determined using this method?

*To the contrary, ear plugs are not considered to be an accurate method when attempting to determine the age of gray whales. For this reason, ear plugs were not taken. Size categories are more often used with gray whales to estimate relative age.*

9. The Draft EA states that it is expected the Makah tribe would utilize methods from 1999. The EA must state explicitly what methods the Makah would be permitted to use.

*The Tribe’s Management Plan, including a discussion of the methods that the Makah Tribe will use in its hunt, is included in Appendix 10.3.*

10. Since 50 CFR part 230 requires monitoring of the use of the whale products there should be an effort in the Draft EA to quantify how much was used for consumption and how much was wasted.

*As noted in Section 4.4.4, almost all edible portions of the meat and blubber were removed from the whale by tribal members. The meat and blubber were consumed by Makah Tribal members and during tribal ceremonies. NOAA regulations at 50 CFR part 230 prohibit any person from selling or offering for sale any whale products from whales taken in an aboriginal subsistence hunt; however, these regulations do not specifically require monitoring the use of the whale products.*

11. Section 4.2.6 ignores the whales caught in Makah set nets, and should include those whales as a strike if released and against the quota if killed.

*Whales taken incidentally to fishing operations have never been counted against commercial or aboriginal quotas in the IWC.*

12. In 1998, the Canadian government unilaterally gave the Makah and the U.S. Government permission to enter Canadian waters off the coast of British Columbia in the event they were in pursuit of a whale which they had wounded. This violates Canada's immigration act, Criminal code dealing with restricted weapons, and other laws. Further, issuance of a CITES export permit would violate that treaty.

*NMFS presumes the Canadian government does not give permission for activities that would violate any of its statutes or international treaties to which it is a party.*

13. The Draft EA does not address media reports from 1999 that drug testing was conducted on the Makah whalers for safety reasons; reportedly, many whalers failed the test.

*The Makah Tribe is responsible for regulating and managing the hunt and is responsible for the development and enforcement of Tribal regulations regarding the conduct of whaling crews.*

14. Makah whalers have been observed targeting and harassing non-migrating whales on numerous occasions. The Final EA should consider the impacts of Makah whaling to the individual whales pursued.

*NMFS recognizes that, during the Tribal hunt, whalers will approach and attempt to strike gray whales; not all of these whales will be taken or struck. A discussion of the potential impacts on individual whales is included in Section 5.3 of the Final EA.*

15. The IWC adopted criteria in 1980 (IWC/33/15) on humane killing and reiterated in 1992 which include "causing its death without pain, stress or distress perceptible to the animal..". The EA acknowledges that whales feel pain, "It is acknowledged that wounded whales could be dangerous; this is true for any large animal in pain". Therefore the 8 minutes it took to kill the whale in 1999 was not humane under IWC standards.

*The quoted text from this comment represents only a portion of the criteria adopted in 1980. At the Workshop on Humane Killing Techniques for Whales in 1980, the following working definition for the humane killing of an animals was adopted: "... causing its death without pain, stress, or distress perceptible to the anima. That is the ideal. Any humane killing technique aims to render an animal insensitive to pain as swiftly as is technically possible, which in practice cannot be instantaneous in the scientific sense." The U.S. Government works with U.S. Natives*

*to ensure that hunts by U.S. Natives are conducted as humanely as possible and continues to support efforts by U.S. Natives to improve the humaneness of their aboriginal hunts and to continue to reduce the time-to-death of struck whales.*

16. The United Nations Environment Programme (UNEP) Plan of Action for Management and Conservation of Marine Mammals (1994) contains specific requirements that any exploitation of marine mammals be carried out in a humane manner.

*In accordance with IWC guidance, the U.S. Government ensures that whaling by U.S. Natives is conducted using as humane a method as is possible.*

17. The paper presented at the 1995 IWC Humane Killing Workshop by the United States dealt with a whale being struck with a harpoon and should be included.

*NMFS does not believe that the papers on the Alaska Eskimo bowhead hunt submitted to the 1995 Meeting of the Working Group on Humane Killing Methods are directly relevant to this EA. As discussed in Section 4.4.2, the Makah Tribe evaluated and tested methods of dispatching a harpooned whale to enhance the efficiency and humaneness of a gray whale hunt. The Tribe considered the methods used by Alaska Eskimos to hunt bowhead whales, but found them to be inappropriate and unsafe for use on the smaller gray whale. The hunting techniques outlined in the Management Plan ensure that the hunt is conducted as humanely as possible.*

18. It is offensive to say that the Plan “ensures” a humane death. It would be better to say: “To make the time of death occur as quickly as possible recognizing our limits to do this.”

*NOAA agrees that it is not possible to ensure that a humane death occurs during a hunt. NOAA has revised the Final EA to clarify that the Plan includes provisions to ensure that the hunt is conducted as humanely as possible and in a manner that minimizes the time that it takes to kill the animal.*

19. Section 3.1 of the Draft EA, should not include use of the phrase “immediate dispatch” when describing the death of the gray whale that was killed in May 1999. NOAA’s report indicates that it took 8 minutes for the gray whale to cease movement from the time of the first harpoon strike.

*NOAA’s use of the word “immediate” in the Draft EA was intended to clarify that once a gray whale is harpooned the chase boat would immediately approach the animal to kill it using a high-powered rifle. The term “immediate dispatch” was not meant to imply that the animal was killed “instantaneously”; as explained in the Draft EA, the gray whale killed in 1999 died approximately 8 minutes after the initial harpoon strike.*

20. The reason for the decision to use a 50 caliber gun to hasten the death of a wounded whale was commendable, but the killing of gray whales is cruel and cannot be performed without causing prolonged suffering even with modern equipment.

*NOAA recognizes that many citizens believe that it is not possible to conduct a gray whale hunt in a humane manner. The U.S. Governmental allows U.S. Natives to kill whales for aboriginal subsistence purposes through quotas granted by the IWC and works directly with U.S. Natives to ensure that these native hunts are conducted as humanely as possible.*

21. What contingency plans are in place in the event that the rifle seizes or otherwise fails to operate?

*The Tribe carries an extra high-caliber rifle aboard the chase boat in the event of complications with the primary rifle.*

22. If the Makah are granted a quota under Alternatives 1, 2, or 3, the Tribe should develop a management plan that is consistent with IWC quotas, humane killing methods, and it sensitive to the public's desire to protect both treaty rights and the gray whale population.

*The Makah Tribe has adopted a revised Management Plan that addresses these issues. See Appendix 10.3 of the Final EA.*

23. Al Ingling is linked to NMFS through his work with the Makah and has stated that 15 minutes is the goal for time to death. Is this the goal of NOAA?

*In accordance with IWC guidance, NOAA requires that hunt be conducted in a manner that is as humane and as efficient as possible and minimizes the time to death of the animal. NOAA does not have specific regulations or goals regarding the time to death for aboriginal hunts.*

24. The definition of "strike" in the Draft EA is inconsistent with the definition in the IWC Schedule and with the NOAA definition in U.S. regulations.

*The Makah Management Plan has been revised to delete any reference to the likely outcome of the blow, in the definition of "strike." Any rifle shot that hits a whale is a strike; any harpoon blow in which the harpoon is embedded in a whale is a strike. A glancing harpoon blow, which is unlikely to cause serious injury to the whale, would not be counted as a strike. This definition is consistent with the NOAA definition, and with the IWC Schedule definition ("to penetrate with a weapon used for whaling").*

25. The definition of "strike" in the Draft EA may be difficult to apply. How will it be determined whether a harpoon strike has caused sufficient trauma to be considered serious and who will make this determination? How will one be able to tell if a bullet has entered a whale's body?

*As discussed in the response to comment L-24, the definition of “strike” in the Makah Tribe’s Management Plan has been revised. The observers of the hunt (NMFS and Tribal) should be able to determine if a rifle shot hits a whale by observing the whale’s behavior and by continuing to monitor the animal after the shot is fired.*

26. The Draft EA states that the Agency may allow up to seven strikes per year. This needs to be explained and reconciled with the statement made in Section 2.3 of the Draft EA that the request made to the IWC on behalf of the Makah was for no more than five whales to be taken in any one year.

*The IWC has always set gray whale subsistence quotas in terms of whales “taken”; the term “take” is defined in the Schedule as “to flag, buoy or make fast to a whale catcher.” That is why the U.S.-Russian request was for a number of whales taken. The Makah Tribe, in the 1997 agreement with NOAA, said it would limit the number of strikes each year (seven annually in 2001 and 2002), to address concerns that the Tribe might injure a substantial number of whales but fail to reduce them to possession.*

27. More information is needed about what will be done to improve the struck and lost rate and how NMFS and the Makah will enforce any restrictions on the whaling activity if conducted.

*The Management Plan requires extensive training for crew members, in part to minimize the number of whales that are struck and lost. As explained in Section 2.4 of the Draft EA, there is a limit on the number of whales that can be struck and lost. At the moment, there is no need to improve the struck-and-lost rate, as only one whale was struck and it was landed successfully.*

## **Section M - Treaty rights/legal issues**

1. The Treaty of Neah Bay gives the Makah “The right of taking fish and of whaling or sealing in usual and accustomed grounds... *in common* with all citizens of the United States...” Since other citizens of the United States do not have the right to hunt whales, neither do the Makah. This should be analyzed under the Boldt Decision Conclusions of Law, paragraph 19, which says that this treaty right is to be exercised in common with non-Indians.

*The Supreme Court has interpreted “in common with” language in Indian treaties as a means of limiting but not taking away Indian rights. In United States v. Winans, 198 U.S. 371 (1905), the Court explicitly rejected an argument that the treaty gave the Indians no rights but those that any inhabitant of the state or territory would have. That ruling has been followed ever since. See F. Cohen, Handbook of Federal Indian Law (1982 ed.), pp. 444, 453.*

2. The Agency’s legal defense has been based on Washington v. Washington State Commercial

Passenger Fishing Vessel Ass'n, 1979; however, the logic does not apply to Makah whaling. In this case, the issue was how much fish the Tribe was entitled to in relation to others, not whether anyone is entitled to the fish at all.

*See response to comment M-1.*

3. The Treaty of Neah Bay is subordinate to more recent laws and treaties, in particular the Whaling Convention Act, ICRW, CITES, and the ESA. The MMPA clearly prohibits whaling in U.S. coastal waters. The EA does not come out and state the NOAA position on this issue.

*This issue is addressed in Section 2.5.2 of the EA, and in answers to other comments.*

4. There is no provision in the MMPA or the ESA that exempts the Makah from the MMPA's prohibitions against the taking of marine mammals. The United States relies on U.S. v. Dion in its interpretation of Congressional intent to abrogate treaty rights. In fact, U.S. v. Billie has greater relevance in showing that the ESA did abrogate treaty rights.

*See response to comment M-6.*

5. The claimed whaling rights by the Makah Tribe were abrogated by the MMPA just as the Sioux Tribe's hunting rights were abrogated by the Bald Eagle Protection Act (U.S. v. Dion).

*See response to comment M-6.*

6. The Draft EA states that after careful analysis, DOC and DOI concluded that the MMPA does not abrogate the Indian treaty rights to harvest marine mammals. This analysis should be discussed in more detail.

*The analysis is based on United States v. Dion, 476 U.S. 734, 740-41 (1986), which requires "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." A review of the legislative history of the original act and the 1981 amendment to Section 101(b) indicates that the "Native exemption" addresses only Indians, Aleuts, and Eskimos living in Alaska. Northwest treaty Indian hunting and fishing rights apparently were not considered. The agencies compared two District Court cases interpreting other statutes with similar exemptions for Alaska Natives, and reaching different conclusions based on the legislative history of the Endangered Species Act and the Migratory Bird Treaty Act. In August of 1994 the Departments of Commerce and Interior agreed that the MMPA does not abrogate the Makah Tribe's treaty rights. The Marine Mammal Commission is on record as not taking issue with the conclusion that the treaty rights of the Makah may not have been abrogated by the MMPA (letter from John Twiss to D. James Baker, September 4, 1997).*

7. The Marine Mammal Commission requested an analysis of the interplay between Section 102(f) of the MMPA, which prohibits any person or vessel from taking whales incident to commercial whaling in waters subject to the jurisdiction of the United States.

*Such an analysis is clearly outside the scope of the EA, since commercial whaling is neither contemplated nor allowed under any of the alternatives.*

8. The Whaling Convention Act limits and regulates (but does not abrogate) the whaling rights of the Makah under the Treaty of Neah Bay. The Whaling Convention Act and 50 CFR 230 regulate aboriginal whaling claims, under treaty or otherwise. The federal regulations clarify that any claimed right of whaling must be recognized by the IWC. This recognition has been denied the Makah.

*See response to comment A-1*

9. Under Article 30 of the Vienna Convention on the Law of Treaties, when parties to the earlier treaty are party to the later treaty, the earlier treaty only applies to the extent that its provisions are compatible.

*The Vienna Convention applies to international treaties, not to the interplay between an international treaty and a treaty between the United States and an Indian Tribe.*

10. Under international law, the U.S./Makah treaty is a matter of domestic law, and no party to an international convention may invoke its internal law as justification for its failure to perform a treaty.

*The United States has performed its obligations under the International Convention for the Regulation of Whaling.*

11. The discussion should be expanded to include United States vs. James G. Swan.

*Swan is a District Court case decided in 1892. The opinion does not speak directly to treaty interaction, but dismisses a defense that the sealing vessel was owned and operated by members of the Makah Tribe on the basis that the Indians had no claim “for peculiar or superior rights or privileges denied to citizens of the country in general.” This line of reasoning has not been followed in modern jurisprudence (see comment on “in common with” language above). The leading case on the interaction between international treaties and Indian treaties is Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n, a 1979 Supreme Court opinion that rejected the State’s argument that Canada-United States conventions on salmon management extinguished Indian treaty rights.*

12. Section 2.5 of the Draft EA discusses the interplay between the Treaty of Neah Bay and the

ICRW, but the Agency does not take an explicit position on this issue. Section 2.5.3 of the Draft EA indicates that it is the position of the U.S. Government that it should obtain IWC approval before authorizing subsistence whaling, but does not state that such authorization is required. In other contexts, however, the Agency takes the position that any aboriginal subsistence whaling is subject to the requirements of the ICRW. The Agency's position on this issue needs to be clarified.

*The United States has attempted to reconcile its obligations under the two treaties by obtaining a quota from the IWC before sanctioning an aboriginal subsistence hunt. The NOAA regulations are designed as a co-management system for aboriginal quotas granted by the IWC. There is currently no disconnect between the two treaties, since the IWC set a five-year quota for the aboriginal harvest of gray whales in 1997. As to Alternative 4, NEPA requires analysis of all reasonable alternatives, whether or not they are within the agency's authority to implement.*

13. If the whaling rights of the Makah have not been abrogated by either the MMPA or the WCA, as the Agency argues, what is the basis for the Agency's belief that Makah whaling is subject to the Agency's regulation (e.g. that commercial use is forbidden) or is subject to limitation by the IWC (e.g. prohibition on takes of mother-calf pairs)?

*The Makah Tribe, through its own Management Plan, has chosen to accept these constraints on its hunt. Any violation of the Management Plan would be handled in accordance with Tribal regulations. The United States would report any take of a calf or accompanying female to the IWC as an infraction.*

14. The MMPA abrogated or modified Indian rights to hunt whales. The native Alaskan exemption in the MMPA does not apply to the Makah. The statement that the Makah hunt seals and sea lions with NMFS acquiescence is irrelevant to this issue.

*See response to comment M-6. NMFS' acquiescence in the seal and sea lion hunts is an expression of its interpretation of the MMPA, which applies equally to gray whales.*

15. Also, in the second paragraph of 2.5.2 there is a presumption of alignment of the domestic and international treaties and domestic legislation. This premise is flawed as the Makah treaty was not debated during enactment of these other treaties.

*Abrogation of an Indian treaty by an act of Congress must be explicit in the statute or the legislative history. Lack of debate or discussion of an issue does not meet the standard set by the Supreme Court in United States v. Dion. Silence does not imply abrogation.*

16. It is irrelevant that the legislative histories of the MMPA or the WCA do not refer to the Treaty of Neah Bay. These laws were passed 30 and 50 years ago, respectively, before the treaty became an issue, so it is not surprising that Congress neglected to reference the Treaty.



*See response to comment M-15.*

17. The United States is under no treaty obligation to permit whaling since the United States has reserved the right to unilaterally abrogate treaties.

*The United States may unilaterally abrogate an Indian treaty, but an act of Congress is required to do so.*

18. The Treaty of Neah Bay is not absolute. In Makah Indian Tribe v. United States, 7 Ind. Cl. Comm. 477 (1959), the courts found that the rights were not so absolute that the government cannot impose reasonable regulations designed to conserve natural resources for the benefit of all, and that in no sense was the treaty a guarantee of future commercial fishing rights. The ruling recognized the Tribe's lack of a subsistence economy.

*Neither the Makah Tribe nor NOAA claims that the Tribe's rights under the Treaty are absolute. See the discussion at Section 2.5.2 on the "conservation necessity principle." The holding of the Indian Claims Commission in the 1959 case was that the seasonal restrictions imposed by an international commission were "absolutely necessary to conserve, protect, and rehabilitate the halibut species" (7 Ind. Cl. Comm. 477 at 507). The Commission's finding of fact that the modern Makah "does not depend upon a subsistence economy as practiced by his forefathers at the time of the 1855 Treaty" (7 Ind. Cl. Comm. 477 at 505) related to the Tribe's claim that the seasonal restrictions on the commercial halibut fishery interfered with its treaty rights to a subsistence fishery; the Commission ruled they did not.*

19. The Makah believe that treaty rights are property rights, the whales are their property. Their reservation ends at the ocean's edge and thus the whales are not their property.

*Gray whales are not the "property" of the Makah until they are reduced to possession. The Treaty of Neah Bay reserves the right of the Tribe of whaling "at usual and accustomed grounds"; the Makah Tribe's usual and accustomed grounds extend into the waters surrounding the reservation.*

20. How does the Treaty of Neah Bay stand in relation to the Makah intent to commercially harvest whales?

*See response to comment E-1.*

21. The EA is also inconsistent with Section 1378 of the MMPA which states that the Secretary shall amend any treaty to make the treaty consistent with the MMPA. 108(a)(4) of the MMPA, requests the Secretaries of Commerce and State to initiate amendment of any relevant existing international treaty "consistent with the purposes and policies of this Act," citing legislative history suggesting that the

ICRW was inconsistent with the MMPA. The Draft EA failed to explain how the actions are consistent with the obligations under this section.

*The House report on the 1972 Act does mention the Whaling Convention as an “obvious case” of an agreement in need of amendment. In the context of the early 1970s, this was clearly a reference to the growing movement to declare a moratorium on commercial whaling, which was eventually accomplished by the IWC’s amendment of its Schedule in the mid-1980s. Note also that the 1972 Act contained the exception (in Section 102(a)(2)) for takings of marine mammals allowed by preexisting treaties.*

22. The Marine Mammal Commission has raised with NOAA in the past that the MMPA Amendment language regarding non-abrogation of treaty rights referred solely to the 1994 Amendments and not to the entire MMPA of 1972. The Final EA should include clarification on this point.

*See response to comment M-6.*

23. We do not believe that any hunt by the Makah is in compliance with the WCA. Alternative 4 is the only alternative that is legal.

*The basis for this belief is the opinion that the IWC has not set a quota that the Makah Tribe may use. See response to comment A-1.*

24. We agree with the statement in the Draft EA that the only way the U.S. Government could have satisfied its obligations under both the Treaty of Neah Bay and the ICRW was to obtain a quota (based on recognition of the Makah ASW claim) from the IWC (Section 2.5.3, p.5. of the Draft EA). Because the United States failed to obtain this recognition at the IWC, NOAA must choose Alternative 4.

*NOAA disagrees with this rationale for selecting Alternative 4 from the Draft EA. See response to comment A-1.*

25. The Treaty of Neah Bay defined a relationship between two sovereign governments, and this special relationship has been recognized by the courts as giving a special responsibility to the federal government of trust responsibilities.

*NOAA agrees with the comment.*

26. The Final EA should include a discussion of NOAA’s authority to override U.S. commitments to ICRW and the IWC and the will of most American people on this issue.

*The United States has fulfilled its obligations under the ICRW. NOAA has explained its reasons*

*for supporting the Makah hunt in the EA.*

27. Under article thirty of the Vienna Convention on the Law of Treaties adopted in 1969, an earlier treaty applies only to the extent that its provisions are compatible. The ICRW therefore has precedence over the Treaty of Neah Bay.

*See response to comment M-9.*

28. The Government justifies its position on this issue by citing a Secretarial Order and multiple Executive Orders. These Orders do not compel satisfaction of every desire of any tribe if it is part of a treaty. These orders (Secretarial order 3206, EO 13084, and EO 13175) should be provided and are not sufficient as authority for actions proposed in the EA under NEPA.

*The orders were described in Section 2.5.1, not as a justification for complying with each and every request from an Indian Tribe, but as an explication of how the Federal Government interacts with Indian Tribes in carrying out its trust responsibility. These Executive Orders are not included in the Final EA since they are publicly available.*

29. The Draft EA states that Executive Order 13175 directs agencies to “explore and, where appropriate, use consensual mechanisms for developing regulations.” Although not included in the Draft EA, the EO goes on to state that these “consensual mechanisms” include “negotiated rulemaking.” We do not think that the Agency has attempted any meaningful negotiation or consensus-building on this issue within the local community.

*Within the context of the Executive Order, the use of consensual mechanisms for developing regulations appears to refer to negotiations between the Federal agency and the Tribe.*

30. There is no federal trust responsibility in this case because there is no way of life or property at stake for the Makah. There is no continuous “way of life”, only a history, and no property at stake because the treaty only reserves the right to hunt “in common” with other citizens.

*See responses to comment A-1 and M-1.*

31. The threat of litigation by the Makah based on federal trust does not constitute grounds for NMFS to violate domestic and international law.

*NMFS is not violating domestic or international law.*

32. The agency is overstating its federal trust responsibility. The United States is under no obligation to interpret and implement the Treaty Bay in a manner desired by the Makah. The Government has substantial discretion in how to address any treaty issue within an international forum like the IWC

(Adams v. Vance and Japan Whaling Ass'n v. American Cetacean Society). According to Beck (1996) if the Government did not seek a quota from the IWC for the Makah, the Makah would not likely prevail in any legal challenge. The Government's concern that the Makah may sue is irrelevant and should not be considered in this analysis.

*The comment mischaracterizes the Beck article ("The Makah's Decision to Reinstate Whaling: When Conservationists Clash with Native Americans Over an Ancient Hunting Tradition," 11 J. Env'tl. L. & Litig. 359 (1996). The author of the article concluded that the Tribe would not have prevailed in a lawsuit in a Federal or international court to compel the agency to submit its petition to the IWC (at 375). She also discussed more complex issues (at 373-74): "This particular legal question of whether U.S. obligations under international conventions can constructively abrogate a Native American treaty right, in spite of the Dion standard, has never been decided by Federal courts. But, because the Makah have already decided to seek explicit permission from the IWC, there may actually be no need to resolve this question, at least for the time being....Only in the case where the IWC denies the Makah's petition and where the Makah also decide to challenge the purview of the IWC to deny their treaty right would a federal court be forced to grapple with this question. The analysis above suggests that the Makah might lose such a challenge, but of course, because this precise question has not yet been litigated, it is difficult to predict with certainty."*

33. The Government's fear of litigation from the Makah or the potential that the Makah may whale without government approval are not grounds for rejecting Alternative 4. The Government fears potential litigation by the Makah if it denies the Tribe a quota, but is willing to facilitate whaling by the Makah despite losing one court case on this issue. Under NEPA, the Government is required to provide a no-action alternative and it must subject this alternative to the same fair and objective analysis as it subjects the other alternatives. Further, 5.4 should include a more balanced discussion of views on the issue.

*The discussion of potential litigation in Section 5.4 describes the impact of this alternative on the Tribe and its probable reaction to an agency decision denying a quota. The agency is making its best effort to comply with all its legal obligations, whether they stem from international treaties, Indian treaties, or statutes.*

34. If the Makah were to pursue litigation to be allowed to whale, there is little chance that they would prevail. If the Makah elected to whale without Government approval, there is a strong likelihood that the Government would prevail in court by arguing that the Makah's unilateral actions violate international conventions and domestic treaties and laws.

*See responses to comments M-32 and M-33.*

35. Section 2.5.4 of the Draft EA notes that NMFS has allowed the take of marine mammals by

Indian tribes where there is no conservation risk. As an example, the Draft EA notes that “the Makah Tribe harvests Pacific harbor seals and California sea lions with the acquiescence of NMFS.” The situation is very different for whaling where there is an international convention on whaling, a moratorium on commercial hunting, and there is an exemption for aboriginal whaling.

*The discussion in Section 2.5.4 addresses the question whether the MMPA itself abrogates Indian treaty rights to harvest marine mammals. The ICRW, the commercial moratorium, and the exemption for aboriginal whaling are addressed elsewhere in the EA.*

36. We believe that the United States and Canada violated articles 14 and 15 of the NAFTA Environmental Accords.

*Apparently the comment is based on the premise that the United States has violated its own environmental laws, and is therefore out of compliance with the NAFTA Environmental Accords. The premise is incorrect.*

37. Section 2.6 states that 50 CFR, part 230 did not “authorize” whaling nor was written with the Makah in mind; however, this is false, shown by the changing of the “or” to describe subsistence/cultural whaling. These statements should be deleted.

*Section 2.6 states, correctly, that the June 1996 regulations “broadened the existing regulations to encompass the possibility of Makah whaling....The regulations did not authorize whaling of any kind nor did they address the specifics of the Makah interest in whaling.” Makah whaling was not authorized until NOAA published a quota in the spring of 1998. See response to comment M-60.*

38. Section 1 of the Draft EA states that NOAA’s objective is to “accommodate Federal trust responsibilities. . . while ensuring that any tribal whaling activity does not threaten the eastern North Pacific gray whale population. The priorities are not correct in this statement. NOAA’s primary responsibility is to the marine environment and the protected species under its jurisdiction. Its Federal trust responsibilities to Native American tribes are important but secondary to its responsibilities to the environment and protected species.

*Section 1 has been revised to add the phrase, “to the fullest extent possible consistent with applicable law,” to address this comment.*

39. NOAA has admitted that whaling within the boundaries of the Olympic Coast National Marine Sanctuary will have a negative impact on the image of the sanctuary.

*NOAA agrees that whaling within or adjacent to the Sanctuary may adversely affect the public perception of the intent and purposes of this and other federally protected marine sanctuaries;*

*however, the management goal of the Sanctuary is to protect the marine environment and other resources and qualities of the Sanctuary while allowing for compatible and sustainable resource uses. Sanctuary regulations do not preclude the exercise of tribal treaty rights as long as they are conducted in compliance with Federal laws.*

40. The Olympic Coast National Marine Sanctuary EIS states that it is prohibited to take any marine mammal in violation of the MMPA. This is a “significant new circumstance” that would require a new EIS.

*The comment correctly notes that the Olympic Coast National Marine Sanctuary EIS states that one may not take any marine mammal in violation of the MMPA, but the EIS and Sanctuary regulations further state “...except as authorized by the National Marine Fisheries Service...or pursuant to any treaty with and Indian tribe to which the United States is a party, provided that the treaty right is exercised in accordance with the MMPA, ESA, and MBTA” (FEIS III-36). The aboriginal hunt of gray whales by the Makah Tribe is secured by the Treaty of Neah Bay, would not be a violation of the MMPA, and does not require preparation of a new EIS.*

41. The section of the Olympic Coast National Marine Sanctuary EIS that relates to Makah whaling must be included in the EA.

*The draft and Final EAs included discussion of the relevant sections of the EIS that was prepared prior to the designation of the Olympic Coast National Marine Sanctuary. The regulations for implementing the National Sanctuary Program and regulations specifically applicable to the Olympic Coast National Marine Sanctuary can be viewed on the Sanctuary’s website at <http://www.ocnms.nos.gov/pubdocs/reg.html>*

42. The fact that a license has been issued for Makah whaling activities which may occur within the Olympic Coast National Marine Sanctuary trigger consultation procedures under the Marine Sanctuaries Act.

*In accordance with the National Marine Sanctuaries Act, NOAA has consulted with the staff of the Olympic Coast National Marine Sanctuary and the National Sanctuary Program headquarters office in preparation of this EA and in contemplation of a hunt in the Sanctuary.*

43. The hunting of marine wildlife, including gray whales, should not be permitted by any group within a marine sanctuary.

*As discussed in Section 4.1.2 of the Final EA, National Marine Sanctuaries are managed under multiple objectives, including maintaining natural biological communities, enhancing public awareness, and the sustainable use of the marine environment. The EIS prepared prior to the designation of the Sanctuary and Sanctuary regulations specifically acknowledge the treaty*

*rights of those tribes whose U&A areas are in the Sanctuary. Sanctuary regulations do not preclude the exercise of tribal treaty rights as long as they are conducted in compliance with Federal laws. Activities authorized by Federal treaties, including hunting of whales and seals, are allowed.*

44. The Makah Tribe abandoned all whale killing over 70 years ago. The courts of the United States have consistently held that such abandonment of practices by Indian tribes can be the basis for extinguishment of treaty rights.

*Supreme Court and Ninth Circuit Court of Appeals cases have consistently held to the contrary, that treaty rights are not extinguished through failure to exercise them. See, for example, United States v. Washington, 157 F.3d 630 (9<sup>th</sup> Cir. 1998)*

45. There is no question that anti-Indian, anti-Makah racism continue to be intertwined with Makah whaling, yet the Draft EA does not include discussion of the impacts of racism/anti-Indian sentiments. We strongly recommend that NOAA specifically include the impacts on the Makah of racism/anti-Indian issues in the Final EA.

*NMFS believes that these issues are outside the scope of this environmental analysis.*

46. One proposal is to return traditional tribal lands currently in the hands of the National Park Service in exchange for a commitment from the tribe to forgo whaling and instead, in accordance with the Makah's 1996 needs statement to the IWC, continue to store away or hold such rights, privileges, and practices kept viable for the time when they may be appropriately used again. This proposal was reported to the media and submitted to 27 members of Congress.

*NOAA has not been contacted by the Makah Tribe or any member of Congress regarding any interest in such a proposal.*

47. The conclusion that the Tribe cannot be compensated for not exercising a treaty right is unjustified. It should be left to a legal opinion and adjudicated in the courts and Congress.

*No right to compensation exists, absent a statute or treaty authorizing compensation. See F. Cohen, Handbook of Federal Indian Law (1982 ed.), pp. 443.*

48. While it is true that a traditional right cannot be compensated for with money, a treaty right can be compensated for with a package of incentives that could include money, support, land, and other benefits.

*Congress could authorize compensation for extinguishing a treaty right, but has not done so in this instance.*

49. What is the origin for the delineation of the Makah's usual and accustomed whaling grounds?

*The Makah's usual and accustomed grounds have been adjudicated in a series of opinions under the United States v. Washington case. The most prominent of these is found at 730 F.2d 1314 (9<sup>th</sup> Cir. 1984).*

50. Since the current U&A boundaries extend into Canadian waters, NMFS should explain the legal issues associated with the Tribe pursuing or killing a whale in Canadian waters.

*The U&A does not extend into Canadian waters. The commenter may have been confused by a reference in Section 3.1 to the "ocean area of the Tribe's usual and accustomed grounds (U&A) (outside the Strait of Juan de Fuca westward of a line from Bonilla Point in Canada to Tatoosh Island off northern Washington)." This reference delineated the ocean sector of the Tribe's U&A from the "inside" sector; the customary dividing line between the Pacific Ocean and the Strait is the line described in the parenthetical.*

51. If the boundaries of the Flattery Rocks and Quillauyte National Wildlife Refuges incorporate waters in which the Makah may hunt, several additional laws would apply (Refuge Recreation Act, National Wildlife Refuge System Improvement Act, and USFWS regs). The Final EA should include more information about the refuges and whether Makah whaling would occur within refuge boundaries.

*The boundaries of these refuges only include areas upward of the mean high water line and, therefore, do not include the waters in which the Makah Tribe would be conducting a hunt. Potential impacts on refuge resources are discussed in Section 5 of the EA.*

52. The Draft EA identifies a number of species of federally-listed endangered or threatened species. For several species, the Draft EA concedes that Makah whale hunting "may effect" the species, thereby triggering the formal consultation under the ESA.

*In accordance with Section 7 of the Endangered Species Act, NMFS consulted with the U.S. Fish and Wildlife Service in the preparation of this EA.*

53. Several scenarios under Alternative 4 imply that the U.S. Government would take no action to prosecute Makah whalers if they conduct a hunt without a quota. This should be explained.

*NOAA will not speculate about actions of other Federal agencies in the unlikely event of whaling without a NOAA-allocated quota, a possibility made even more unlikely under the preferred alternative.*

54. The Draft EA does not mention that the Agreement between the Makah and NOAA has an expiration date, after which a new agreement could be negotiated. All aspects of the Agreement,



including take limits, struck-and-lost limits, and a prohibition of commercial use of products would be subject to renegotiation. The Final EA should be revised accordingly.

*Section 2.4 of the Final EA discusses the Makah Tribe's revised Management Plan which includes limits on the numbers of takes and strikes of gray whales and prohibitions on the commercial use of products. If this comment is addressing continuation of an agreement beyond 2002, that is beyond the scope of the EA.*

55. The Draft EA fails to describe several instances in which the Makah Tribe acted in bad faith with the federal government in its efforts to secure a whale quota and in conducting a whale hunt. These actions included: hunt management violations regarding consumption of whale meat by non-local non-tribal members; paying tribal members for whaling activities in contravention to IWC regulations and federal law; and refusing to accept NOAA's rescission of the management agreement following the federal appeals court ruling.

*NOAA does not consider that the Tribe has acted in bad faith with the Federal Government. The issue of whale meat consumption is addressed in the response to comment O-10. The issue of payment for whaling activities is discussed in the response to comment J-19. The issue of rescission of the Agreement is found in the response to comment M-61.*

56. The fact that the Makah tribe did not accept NOAA's rescission of the agreement shows that the tribe refuses to abide by the order of the court, and shows the NMFS bias in proceeding on this issue on behalf of a group that does not abide by US laws.

*The opinion by the U.S. Court of Appeals for the Ninth Circuit required NOAA to "suspend implementation" of the 1997 agreement. NOAA went a step further in unilaterally rescinding the agreement. The Tribe responded that the court opinion did not require such a step, and that the agreement, by its own terms, could not be unilaterally rescinded by either party. The crucial point, however, is that the Tribe has not issued a whaling permit since the Ninth Circuit announced its opinion in June 2000. The Tribe has not acted in defiance of any court order or agency regulation.*

57. Since the Makah Tribe was an intervening party in Metcalf v. Daley, its rejection of NOAA's rescission of the agreement is in violation of the Court's order placing the plaintiffs in contempt.

*See response to comment M-56.*

58. How will NMFS ensure that no whale meat leaves the country, if it couldn't ensure that meat from the previous hunt stayed on the reservation?

*No enforcement program is foolproof, but NOAA would point out that monitoring occurs at*

*international border crossings rather more often than on the road from the Neah Bay reservation.*

59. The Government should discuss whether, under the 1997 management agreement, the Makah could have given whale meat and other products to a third party, including another tribe, for the purpose of sale and whether that form of commercial use, even if the Makah did not benefit in any way, was prohibited.

*The 1997 agreement provided that the meat and products of whales taken in the subsistence hunt had to be used exclusively for local consumption and ceremonial purposes and could not be sold or offered for sale. The Makah's management plan contained the same provision. It would have been a violation of both documents for the Makah to have given meat or products to a third party for purpose of sale. In addition, NOAA regulations at 50 CFR part 230 prohibit any person from selling or offering for sale any whale products from whales taken in an aboriginal subsistence hunt.*

60. One comment focuses on the 1996 revision to 50 CFR part 230, which defines "whaling village" as "any U.S. village recognized by the Commission as having a cultural and/or subsistence need for whaling."

*This definition is relevant to the hunt governed by the Alaska Eskimo Whaling Commission, which allocates the IWC quota for bowhead whales among villages identified in the needs statement submitted to the IWC. It is irrelevant where, as in the Makah situation, the IWC quota is allocated to whaling captains. In any event, NOAA considers that the Makah Tribe has both cultural and subsistence needs that are satisfied by the IWC quota.*

61. One comment seeks to distinguish the behavior of deer from that of whales.

*A court case was cited in Section 2.5.2 to illustrate a recent interpretation of the conservation necessity principle in relation to the exercise of treaty rights. The purpose of the citation was not to suggest (or deny) that deer and cetacean behavior can be equated.*

62. The Draft EA does not mention the "complaint" currently under review by the State Attorney General's Office.

*NOAA is aware of a petition for review filed in a Washington state court by the Sea Shepherd Conservation Society and others, based on the Washington Fish and Wildlife Code. The court, on March 9, 2001, granted the State's motion to dismiss the case. Plaintiffs in the Metcalf case argued that Washington law protects gray whales as a "sensitive species." The U.S. District Court noted that state law regarding the prohibition against take of 'sensitive' species is clearly preempted by Federal law. Plaintiffs did not appeal that ruling.*

63. Washington states law prohibits the hunting of protected species, which the eastern north Pacific gray whale is still considered. In addition, resident whales are protected by the State of Washington as a sensitive species.

*See response to comment M-62.*

## Section N - Other tribes

1. On the Pacific coast members of the Quileute, Hoh, and Quinault tribes all actively hunted whales. Also the S'Klallam tribes had a history of taking whales near shore. The EA should be expanded to describe more thoroughly what other tribes may have hunted whales and discuss whether these tribes might possess a right to take whales under the hunting and fishing provisions of their treaties.

*See Section 4.5 for a discussion of other tribes and Section 5.2.8 for a discussion of potential whaling by other tribes.*

2. In discussion of the possibility of whaling by other tribes in Section 51, is the Agency implying that if there is a generalized treaty right possessed by other tribes, the U.S. Government may choose not to endorse the exercise of that right? If so, this would be inconsistent with statements elsewhere in the Draft EA regarding federal trust responsibilities.

*Section 5.2.8 now includes a discussion of the legal issues surrounding whaling by other tribes.*

3. The EA states that Makah whaling is unlikely to lead to whaling by other tribes, however the Nuu Chah Nulth tribe in British Colombia has referenced the Makah Tribe in their efforts to begin whaling in Canada, and have been quoted as planning to take up to 1,000 whales per year. Canadian Inuit communities have also requested permission to whale.

*Sections 4.5 and 5.2.8 have been revised to address the issue of whaling by other tribes.*

4. The PBR analysis should also include the effects of 1,000 whales that may be taken by Canadian tribes.

*As stated in Section 5.2.8, the U.S. Government would respond with any limitations necessary for the conservation of gray whales, should other hunts occur.*

5. The explanation in the Draft EA that the Makah situation has no influence on Canada's tribe because Canada is not a member of the IWC and because the United States opposes whaling by Canadian natives unless Canada rejoins the IWC does not make sense. The Final EA must include a description of the effect that the Makah situation has had and may have on other tribes, particularly those in Canada.

*Section 5.2.8 of the Final EA includes a discussion about potential aboriginal hunts in Canada.*

6. NOAA is attempting to avoid the issue of precedence in the Draft EA by merely stating that "No other tribe has *expressed to NMFS* an interest in whale hunting since the beginning of U.S. support for

the Makah Tribe.”

*As stated in Section 5.10 of the Final EA, NOAA is aware of reports that other tribes are watching the Makah request as a possible prelude to their own proposals. However, no other tribes have expressed an interest in whale hunting and, as discussed in Section 5.10, the right of those tribes to hunt whales is an issue that has not been adjudicated.*

7. The Agency should not interpret the silence of other tribes as an indication that they have no interest in whaling. The district court noted the possibility that whaling by the Makah could encourage other tribes to exercise rights to whale.

*As previously stated, NOAA is aware of reports of interest by other tribes in whaling. However, no tribes have expressed an interest to NOAA.*

8. NOAA’s action to allow whale hunting by the Makah tribe may set a precedent for “traditional” whale hunting in the Gulf of Maine and Bay of Fundy by tribal groups there.

*The issue of precedent is discussed in Section 5.2.8.*

9. Permitting the Makah hunt is likely to cause environmental impacts worldwide through increased whale hunting. It will result in the weakening of the ICRW and diluting the definition of aboriginal subsistence whaling to the point that whale hunting rates may be claimed by any coastal people in the world in the name of cultural tradition.

*As stated in Section 5.2.8, the precedent for allowing aboriginal groups to hunt whales was adopted in the original Schedule of Regulations adopted in 1946. The IWC has been regulating aboriginal subsistence whaling for more than two decades. NOAA believes the Makah quota is consistent with this component of the IWC and is unlikely to lead to whale hunting by other coastal peoples.*

10. By establishing a precedent for an individual government to recognize the aboriginal subsistence need of its own native group, the Government has opened the floodgates to potential subsistence and commercial aboriginal whaling throughout the world.

*Under the quotas granted by the IWC, the individual governments have always been responsible for recognizing the aboriginal subsistence need of their native groups.*

11. How can the United States defend its stance against Japanese scientific whaling, when the U.S. allows harvests of even larger whales within U.S. waters?

*The U.S. supports quotas for its native people for subsistence needs where the quotas are*

*scientifically justifiable. Whaling by U.S. Natives has been approved by the IWC, while Japanese scientific whaling has not.*

13. It should be noted that the Quileute is actively working to establish a regularly scheduled gray whale watching operation. The United States should support the Quileute whale watching proposal, with funding and other assistance.

*NOAA is aware that the Quileute are interested in whale watching, however the issue of financial support for the Quileute's efforts is outside the scope of this analysis.*

14. The statement under Alternative 4 that "Most Indian tribes throughout the United States would likely view [Alternative 4] as insensitivity to the cultural diversity of Native Americans in general" should be deleted unless it can be supported with documentation. There are indications that some Tribes might support this alternative.

*While NMFS does not dispute that some tribes may support the No Action alternative, the statement as rewritten is based on public comments received by members of other tribes, which overwhelmingly supported the right of the Makah Tribe to whale.*

15. Under applicable regulations (40 CFR 1508.27 (b)(6)) one of the factors to consider is the "degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration." Since other Tribes have begun planning to whale, this aspect must be addressed in the EA.

*The precedent issue is discussed in Section 5.2.8.*

## Section O - Background

1. Section 2.2.1 ignores the Makah's own contribution to gray whale decline through participation in the commercial whaling industry.

*This section in the Final EA has been rewritten to give a more detailed account of Makah whaling.*

2. Further, it implies that the U.S. Government "failing to provide assistance for whaling" as promised in the Treaty is incorrect as that is not stated or implied in the treaty.

*The U.S. Government promised to provide assistance for whaling during the negotiations of the Treaty of Neah Bay. Section 2.1 has been revised accordingly.*

3. The information about disease is without foundation and is not cited.

*The epidemics referenced in the draft and Final EAs are well documented; they resulted in a severe decline in the Makah Tribal population. This information is provided specifically to highlight the loss of information (traditions, ceremonies, language) that occurred as a direct result of the epidemics.*

4. The section where the Makah were "forced" to rely on "other sources of food" and "learned other ways to make a living" is a rewrite of history. Several historical references cite that a more lucrative seal hunting industry and decreased value of whale oil at the turn of the century had much to do with the Makah's abandonment of whaling.

*NMFS revised Section 2.1 in response to this comment.*

5 The Final EA should include a discussion of all published historical accounts of the development of Makah whaling and participation in a western economy.

*Section 2.1 contains an account of Makah whaling.*

6. The statement that the Makah "stored away" its cultural whaling traditions contradicts they preceding paragraph that states that they were unable to pass the whaling traditions on to the next generation. The Draft EA fails to state that not a single Makah who whaled is alive.

*See response to comment O-7. Whether any Makah Tribal members who whaled are alive today is not relevant to the fact that the Makah Tribe depends on its tradition of whaling.*

7. There is no support for the statement that the Makah “managed to store away” the whaling traditions – there is no evidence they ever planned to return to whaling once they had moved on to more economically viable pursuits. Without documentation, this must be removed.

*Section 2.1 of the Final EA has been clarified to address this comment.*

8. The EA uses the word “tradition” of whale hunting. This word must be replaced with “history,” as they no longer have a tradition of whale hunting, only a history.

*NOAA recognizes a tradition of whale hunting within the Makah Tribe. See response to comment O-7.*

9. The EA fails to disclose the fact that whale meat was taken from the reservation and served to school children in Port Angeles, WA who were not members of the Makah Tribe. Also that the tribe distributed meat to non-Makah members who do not share a history of potlaches. This was a violation of the IWC aboriginal subsistence definition.

*In IWC parlance, “local consumption” means consumption within the country where the whale was taken; the term does not refer to an Indian reservation or to any other geographical location within a country. NMFS is unaware of any export of meat or blubber from the 1999 whale hunt, and notes that any such export would be illegal under the regulations implementing the Convention on International Trade in Endangered Species (CITES). The Makah Tribe interprets its Management Plan to restrict consumption to the reservation or to Tribal members and their immediate families. They do not expect a recurrence of the 1997 incident in Port Angeles.*

10. The Final EA should include detailed reference to all the uses to which the Makah put the products of the gray whale that was killed in 1999 (Section 2.4 of Draft EA).

*A general description of the use of the meat, blubber, and skeleton from the 1999 harvest was included in the Draft EA at 2.4.1 and 4.2.4.a.2.*

11. Section 4.2.4a of the Draft EA states that the Makah Tribe sought to “continue” its whaling in 1996. It is more correct to use the term “revive” rather than to “continue.” The use of the term “continue” is an attempt to align the Makah hunt with the IWC aboriginal subsistence whaling definition that a hunt be “a continuing cultural dependence.” The Final EA should not use the word “continue” in this context.

*NOAA considers the Makah hunt a continuation of tribal whaling tradition.*

12. The Draft EA is biased and continually cites what the Makah “believe.” The Final EA should



include a more balanced presentation of views.

*NOAA is aware of the Tribe's viewpoints on many issues relating to their treaty rights and their proposal to conduct aboriginal whaling. NOAA has included the viewpoint of the Tribe in the draft and Final EA in order to inform the reader of the position of the Tribe on various issues. The EA summarizes the beliefs of other groups as well.*

13. The Makah are a hunting, fishing, and whaling people. That is their tradition, and it is their treaty right, from a treaty negotiated in good faith with the United States, to exercise the right to whale guaranteed in the treaty.

*See response to comment O-8.*

14. Although the Makah ended their whale hunts, they never stopped identifying themselves as whale hunters.

*See response to comment O-8.*

15. The actions of the Makah Tribe during and following the 1999 hunt do not qualify as “cultural ceremonies.” For example, crew members did back flips off the dead whale and the whale’s dorsal fin was left in a back yard, rather than being taken to a smokehouse for meditation and prayers. How can this be considered reviving culture?

*NOAA does not control the actions of individual tribal members nor mandate the cultural ceremonies of the tribe. The hunt is an aboriginal subsistence hunt conducted under the restrictions set forth in the Makah Tribe’s Management Plan.*

16. No record is given of objections to the hunt, which is a matter of public record from the first EA.

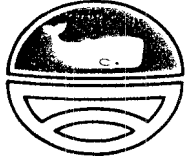
*Section 5.9 discusses opposition to the hunt.*

17. Section 4.4 of the Draft EA states that “The large tribal ceremonies and celebrations...are indicative of the benefits of whaling to the Makah Tribe.” This is not a convincing demonstration of the “benefits” to the Tribe from the whale hunt. NOAA should provide more information to support this statement if the statement remains in the Final EA.

*The whaling traditions of the Makah Tribe are centered around the hunting of the gray whale, including the training for the hunt, the hunting and killing of the whale, and the butchering and consumption of the whale through tribal ceremonies and celebrations. These ceremonies and celebrations are an integral part of the Makah Tribal culture.*

18. Section 2.6 ignores that the Ninth Circuit Court of Appeals decision also cited the inadequacy of the EA and its apparent bias, including the issue of the PCFA whales.

*The Ninth Circuit Court opinion addressed only the timing of the 1997 EA and the possible predisposition of the preparers to find that the whaling proposal would not significantly affect the environment. The opinion did not examine or rule on the contents of the EA.*



## International Whaling Commission

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NG/JAC/27916

12 December 2000

Mr. C.W. Bill Young  
Congress of the United States  
2407 Rayburn Building  
Washington DC 205 15-09 10  
USA

Dear Mr Young

Professor Bo Fernholm has asked me to respond on his behalf to your letter of 1<sup>st</sup> December 2000.

In responding to your request to investigate the statements made in the article you received from Mr Ronnie Wright on the Makah Indian gray whale hunt, I have restricted my comments to references made to the International Whaling Commission (IWC). Comments regarding other statements might best be addressed by the US Commissioner to the IWC, Mr Rolland Schmitten, Department of Commerce, NOAA/IA, Herbert C. Hoover Building, Room 5809, 14th & Constitution NW, Washington DC 20230, USA. [Tel: +1 202 482 6076; Fax: +1 202 482 6000; email: [rolland.schmitten@hq.noaa.gov](mailto:rolland.schmitten@hq.noaa.gov)]. I also attach excerpts from the Chairman's report from the 1996 and 1997 IWC Annual Meetings that cover the IWC's discussions on the Makah hunt. You might find these provide useful background information.

Page 1, paragraph 4:

I have no knowledge of the amount the US government spent on bringing the issue of the Makah gray whale hunt to the IWC.

Page 2, paragraphs 2, 3 and 4:

To address the references to IWC made in these paragraphs, it is necessary to provide a bit of background to aboriginal subsistence hunts in general and to the Makah hunt specifically.

As you will no doubt be aware, there is a ban on commercial whaling at the moment (although Norway has objected to this and Japan is whaling for research purposes, and so both nations continue to take limited catches under legal provisions of the International Convention for the Regulation of Whaling). Whaling for aboriginal purposes is recognised as an exception to this ban, and catches by native peoples in various areas are permitted and regulated by the IWC. However, it should be noted that under the Convention, the IWC can only set catch limits for stocks of whales, and not for individual whaling operations or specified native peoples. If more than one aboriginal operation wishes to catch from that stock, then the IWC's concern is only that the *total* catch limit is not exceeded. This is usually achieved by negotiations among the governments who represent their native peoples. Such allocation does not have to be reported to the IWC, but it often is. Native peoples engaging in subsistence hunts do so under permit issued by their Government.

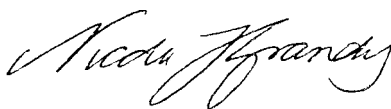
Under IWC regulations and prior to 1997, catches from the eastern North Pacific gray whale stock were taken only by the native people of Chukotka. At the 1996 IWC meeting, the Government of the USA first presented its proposal for an aboriginal hunt by the Makah tribe on this stock, proposing that a catch of five gray whales was required to satisfy cultural and other needs of the tribe. After extensive discussion (see excerpts attached), the proposal was withdrawn until the following year. At the 1997 meeting, the Governments of the USA and the Russian Federation together proposed a catch limit not exceeding 140 gray whales in each of the five years 1998 – 2002, with a total not to exceed 620 in that period at the JWC Annual Meeting in 1997. After extensive discussion (see attached excerpts), the IWC granted the catch of gray whales requested ‘when the *meat and products are to be used exclusively for local consumption by the aborigines whose traditional subsistence and cultural needs have been recognised*’. Of the yearly catch limit, the US and the Russian Federation agreed that 4 gray whales would be allocated to the US.

So from this background, I would comment that:

- IWC did not explicitly give permission to the Makah to kill gray whales – the IWC agreed to the catch limit proposed jointly by the US and the Russian Federation; it is the responsibility of the countries involved to ensure that the IWC regulations are observed.
- I cannot comment on any money that the Makah may have received to help attendance at the IWC Annual Meeting in Monaco in 1997, nor do I have information on who represented the Makah tribe in the US delegation.
- The IWC catch limits agreed for the eastern North Pacific stock of gray whales does not mention the Makah specifically since, as explained above, catch limits are agreed for stocks and not for individual whaling operations or specified native peoples. So the statement on page 2, paragraph 3 is not correct.
- While the IWC did not explicitly sanction the Makah hunt, neither did it explicitly refuse to accept the Makah hunt as an aboriginal subsistence whaling operation. The IWC received a report of the 1999 kill by the Makah. There were no claims that an infraction had taken place. There is thus a *de facto* acceptance of this hunt as falling within the IWC’s requirements for aboriginal subsistence whaling, although I might add that there is a degree of hesitation by some of the IWC members as reflected in the text attached. The onus on designating the Makah hunt an aboriginal subsistence hunt was ultimately left to the US.
- The total annual catch limit was set at 140 not 120.

I hope the above satisfies your request. Don’t hesitate to contact me if you have any questions.

Yours sincerely,



Dr. Nicky Grandy  
Secretary to the Commission

cc: Professor Bo Femholm, Chairman of the International Whaling Commission  
Mr Rolland Schmitten, Commissioner to IWC for the USA